Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	**§**	**WC Docket No. 11-59**

COALITION OF TEXAS CITIES*: COMMENTS ON THE FCC's BROADBAND AND RIGHTS OF WAY NOTICE OF INQUIRY

Submitted: July 18, 2011

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COMES NOW the Texas Municipal League (TML), the Texas Coalition of Cities for Utility Issues (TCCFUI), the Coalition of Texas Cities (CTC) and the City of Houston, Texas (Collectively, the "Coalition")[1] and files these Comments in the Federal Communications Commission (hereinafter "FCC") *Notice of Inquiry Concerning Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*.[2] Other municipal commenters have filed extensive comments on the NOI's inquires concerning wireless

[1] TML is a statewide organization with over 1,200 municipal members. The TML Board formally endorsed a Resolution concerning this NOI signed by the Mayors of the cities of: Arlington, Austin, Corpus Christi, Dallas, Denton, El Paso, Ft. Worth, Plano, San Antonio and Sugarland. The Resolution has been sent separately by TML to the FCC. TCCFUI is an unincorporated affiliation of over 100 Texas cities. See TCCFUI member cities at: http://www.tccfui.org/. Member cities of CTC are: Addison, Allen, Austin, Bedford, Colleyville, Denton, El Paso, Farmers Branch, Galveston, Grapevine, Houston, Hurst, Keller, Marshall, Missouri City, New Braunfels, North Richland Hills, Pasadena, Round Rock, Tyler, Westlake, West University Place, and Wharton.

[2] *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, FCC 11-51, WC Docket No. 11-59, Notice of Inquiry (April 7, 2011). ("Broadband and Rights of Way NOI" or "NOI").

broadband, tower siting, and "Shot Clock" issues. The Coalition adopts by reference the Comments by the City of Arlington and the Comments by the National League of Cities (NLC), *et al.*, on those issues.[3] The Coalition's Comments are limited to *wireline broadband deployment* in the local public rights of way.

Summary of the Coalition's Comments

1.) Underling the NOI is the premise that local rights of way regulations and fees constitute "barriers" to broadband deployment. This premise is based on the FCC erroneously equating total construction cost to install fiber in the rights of way to local rights of way fees. Both Texas and national broadband deployment studies contradict this premise.

Underlying the NOI is the premise that local rights of way regulations and fees constitute "barriers" to broadband deployment (NOI, para. 7-8), a "problem" for which the NOI has proposed "solutions." These Comments will demonstrate, from a review of the very documents the FCC cites, that this premise relies on a misreading of those (largely industry-written) documents. That misreading has resulted in the *NOI's misconception of equating total construction cost* to *install fiber in the rights of way* to *local rights of way fees*, which obviously is in error.

Further, these Comments will cite both Texas and national broadband deployment studies that contradict the premise that local regulations are "barriers" to broadband deployment. Studies cited by the FCC in the NOI or in the National Broadband Plan[4] consistently conclude that broadband deployment is generally higher in cities, as do Texas studies. These broadband deployment studies do not show that broadband deployment is disproportionately lower in cities;

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[3] The Coalition would urge the FCC to postpone all "shot clock" issues until the current appeals are exhausted. *City of Arlington, et al. v. FCC*, Fed. 5th Cir. No. 10-60039, filed 2010.

[4] Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan (2010) ("NBP").

on the contrary, they show that broadband deployment is significantly higher in cities, the very areas where the industry complains of unreasonable barriers to broadband deployment. None of these studies support any correlation between local rights of way requirements with lower broadband deployment.

2.) Timely access to rights of way in Texas, coupled with reasonable and transparent rights of way use rental fees, has resulted in higher broadband deployment in the urban areas of Texas, due in large part to local build-out requirements of cable systems.

The NOI poses a series of questions on several types of local rights of way regulations that could be "barriers" to broadband deployment. These Comments will demonstrate that there are no systemic, locally erected rights of way regulations or polices in the urban areas of Texas that are barriers to broadband deployment, but rather that the opposite is true. Broadband deployment studies in Texas show that broadband deployment is generally higher in urban areas --not lower. This is not mere happenstance. Texas cities have provided timely access to municipal rights of way, with reasonable rights of way fees for over a century. And due to statutory changes in 1999, that continues, with a statutory grant of access to rights of way, coupled with transparently rights of way fees for virtually all telecommunication providers. In 2005 that equivalent timely access to rights of way and transparency in fees was granted to cable providers. Not insignificantly, both statutes also preserved cities' police-powers to promulgate local rights of way management regulations. These state law changes will be discussed in detail. However, long before those state law changes occurred, Texas cities had already laid the foundation for greater broadband deployment in the urban areas of Texas. City required build-out of cable systems decades ago has now borne the fruit of greater broadband deployment in urban areas. Cities that required city-wide build-out of cable systems did so in a provider specific, flexible manner, frequently with varying time frames for different areas, with due consideration given to the specific circumstances of each provider. Statutory changes in 1999 and 2005,

coupled with prior decades of reasonable rights of way access and city-required city-wide build-out, directly contributed to high broadband deployment now enjoyed in Texas cities.

3.) The NOI's proposed FCC solutions to remedy perceived local "barriers" to broadband deployment will be discussed in the context of the FCC's limited statutory authority to implement several of those solutions, and where it is barred by the U.S. Constitution as to others, e.g., unconstitutional taking of local public property for private use.

The NOI proposes a series of FCC "solutions" to remedy perceived local rights of way regulation "barriers" to broadband deployment. The "solutions" range from FCC voluntary and educational programs to FCC rulemaking and adjudication of rights of way disputes. Several of the FCC commissioners (in varying degrees) have already expressly noted the FCC's limited jurisdiction to act in this area in their separately issued statements accompanying the NOI, discussed *supra*. The Coalition concurs with those commissioners in their views of limited FCC jurisdiction in this area.

As these Comments will detail, section 253(d) of the 1996 Federal Telecommunications Act grants only limited jurisdiction to the FCC to act on several of these "solutions." The FCC has no authority under section 253(c) to resolve rights of way management or compensation disputes. The U.S. Constitution bars even Congress, let alone the FCC, from "setting" rights of way rental fee payments for the private use of local public property for less than "just compensation", to do so is an unconstitutional taking.

4.) To enhance and accelerate broadband deployment the Coalition recommends that the FCC follow its own recommendations in the NBP: --- appoint a local task force and recommend to Congress that it preempt state laws that restrict municipal broadband. The FCC should also encourage cities to use the proven successful tool of city-wide build-out, in a flexible, provider-specific manner.

To enhance and accelerate broadband deployment the FCC should adopt its own recommendations -- as set forth in the NBP last year -- and promptly establish a joint of task force with state, Tribal, and local policymakers to craft guidelines for rates, terms, and conditions

for access to public rights of way.[5] In this way, "best practices" can be developed in a common forum and shared with all local communities across the nation. Further, the FCC should adopt its own NBP recommendation and encourage Tribal, state, regional, and local governments building broadband networks by asking Congress to preempt state laws that restrict municipally-provided broadband.[6] Where the private sector does not or will not provide broadband, cities should not be barred by law from doing so. The FCC should also expressly encourage cities to require city-wide build-out, even of new providers, in a flexible, provider-specific manner.

I. THE NOI IS BASED ON THE FALSE PREMISE THAT LOCAL RIGHTS OF WAY REGULATIONS ARE "BARRIERS" TO WIRELINE BROADBAND DEPLOYMENT.

A. Local Rights of Way Regulations are not "Barriers" to Wireline Broadband Deployment.

Underlying the NOI is the premise that local rights of way policies, regulations, rates, and fees constitute "barriers" to broadband deployment (NOI, para. 7-8) for which there must be FCC "solutions." This underlying premise is false because it based on the FCC's misconception of equating the broadband provider's *total construction cost* to install fiber in the rights of way to *local rights of way fees*, an obvious facial error.

1. Underlying the NOI is an erroneous premise that local rights of way policies constitute "barriers" to wireline broadband deployment based on the FCC equating a broadband provider's *total construction cost to install fiber in the rights of way to local rights of way user rental fees.*

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[5] NBP. Recommendation 6.6: The FCC should establish a joint task force with state, Tribal and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way. NBP, Chap. 6, at 113.

[6] NBP. Recommendation 8.19: Congress should make clear that Tribal, state, regional and local governments can build broadband networks. NBP, Chap. 8, at 153.

The premise underlying the NOI that local rights of way regulations and fees constitute "barriers" to wireline broadband deployment is erroneous, as it is based on a misreading by the FCC of the NBP cited documents. This misreading results in the FCC equating a broadband provider's *total construction cost to install fiber in the rights of way to local rights of way user rental fees*. The misconception of equating *total construction cost* in the rights of way to local rights of way fees finds its *genisis in the NBP* relying on the industry *ex parte* letters and industry-filed comments to the FCC. These letters and comments resurrect the decades-old industry-promulgated myth – typically alleged in general "complaints" to the FCC, similar to the ones being inquired about in the NOI-- of the arduous and costly process to obtain rights of way access. The Coalition and the FCC have seen these same local "barrier" issues raised (and disposed of) before years ago, as the FCC notes in the NOI.[7] These same industry complaints have historically been couched in generalities, with few specifics, such as: (1) the "unreasonableness" of the anonymous city; (2) nebulous claims of "undue" and "unwarranted" municipal delays; and (3) the always ubiquitous, but unsubstantiated, claim of high and "unreasonable" permitting fees and charges for use of the local public rights of way. Invariably accompanying these undocumented general industry complaints would be the industry's panacea to fix all of these perceived local "barriers"--the FCC should impose a nationwide "cost-based" rights of way fee. To a large degree, recent industry *ex parte* letters and industry-filed comments cited by the NOI and the NBP follow that same pattern. Seems little has changed; and nothing could be further from the truth, as these Comments will detail.

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[7] NOI ¶ 5, "The Commission, the National Telecommunications and Information Administration (NTIA), and the National Association of Regulatory Utility Commissioners (NARUC) examined these issues and potential solutions in the late 1990s and early 2000s and took steps to address these complex problems." These rights of way access and compensation/"barrier" issues have been examined, studied and reported on since at least the late 1990's, yet broadband is highest in urban areas, as all the broadband studies show, despite these so-called local urban "barriers".

NOI's Misplaced Reliance on page 109 of the National Broadband Plan:

In paragraph 7 of the NOI the FCC states:

> Last year, the National Broadband Plan (Plan) concluded that the rates, terms, and conditions for access to rights of way significantly impact broadband deployment.

This somewhat ambiguous statement, referring to the NBP, forms the FCC's principal, if not sole, basis for the NOI's mistaken implicit conclusion that local rights of way policies are "barriers" to greater and faster broadband deployment. The NOI provides no details, no references, and no unbiased third-party cost studies as authority to support this conclusory statement. Rather, it only cites, by footnote, to a sole page in the NBP.[8] These Comments will review in some detail the two sentences on that cited NBP page that refer to "deploying a broadband network" and "rights of way" cost and the underlying documents on which those two sentences rely. After a careful review of the two sentences, and the underlying documents, the Coalition concludes that the FCC's reliance on them is unfounded. It appears that the FCC has erroneously equated the broadband provider's *total construction cost to install fiber in the rights of way to local rights of way fees*.

The first sentence on page 109 of the NBP, as cited by NOI, that refers to "deploying a broadband network" and "rights of way" cost states:

> The cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights of way on public and private lands.[Endnote 2 omitted][9]

To support this key sentence, and its conclusions, the NBP, Chap. 6, endnote 2, cites *one* industry *ex parte* letter. Endnote 2, states in full:

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[8] NOI, n.19, citing the NBP, at 109.

[9] NBP, Chap. 6, Infrastructure, 6.1, page 109.

> *See* Letter from Judith A. Dumont, Director, Massachusetts Broadband Initiative, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 (Jan. 8, 2010). (Dumont Jan. 8, 2010 *Ex Parte*) at 2 (noting that permitting requirements and procedures for rights of way, poles, conduits and towers "are key to the efficient and streamlined deployment of broadband," and that difficulties in such access "often prove to be the greatest impediment to the efficient, cost-effective, and timely deployment of broadband.")[10]

The NOI cites the NBP to support its premise that local rights of way policies are "barriers" to broadband deployment. The NBP, in turn, relies on one industry-written letter, the Jan. 8, 2010 *ex parte* letter from the Massachusetts Broadband Initiative, as its sole cited support for the above quoted sentence in the NBP. The NBP incorrectly characterizes the letter, which will be reviewed in detail.

Review of Massachusetts Broadband Initiative letter (Dumont Jan. 8, 2010 *Ex Parte*)**:** The letter itself contains but three sentences relating to local rights of ways fees and related "cost" that do not support the NBP's characterization. A careful review of the letter demonstrates that the NBP's reliance on it is not well founded.

Page 1 of the letter lists nine general proposals to the FCC to assist in broadband deployment. *Not one of the nine general proposals concerns costs incurred to access local rights of way (i.e. high fees or charges*). The *letter's principal focus is <u>not</u> local rights of way fees or charges.* On the contrary, *the letter focuses on increased construction cost when there is no local requirement for joint trenching* and on *high pole attachment and make-ready fees charged by utility pole owners*. Neither of these complaints bears any relationship to local rights of way regulations or rights of way use rental fees (other than the *absence of a local regulation* on joint trenching). Further, the letter never states that fees to access rights of way constitute a "significant cost." Rather, it states that "[o]ne of the most *costly aspects of building a broadband*

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[10] NBP, Chap. 6, Infrastructure, 6.1, at 116, n.2.

network is the *digging and trenching in roadways to place telecommunications conduit of direct-bury cable."* The quoted statement occurs in the context of *joint trenching*. Dumont Jan. 8, 2010 *Ex Parte*, at 3 (italics added).

Endnote 2 (p. 116) of the NBP contains two partial quotes from page 2 of the letter. The second partial quote refers to "difficulties" that "often prove to be the greatest impediment to the efficient, cost-effective, and timely deployment of broadband". This quote needs additional context. In isolation it is not clear what the specific "difficulties" referred to might be. The NBP apparently concludes that the "difficulties" the letter references relate to local rights of way regulations or fees. This is incorrect. To conclude so ignores the sentence preceding the quote in the endnote. That preceding sentence provides the context to reveal the "difficulties" considered "impediments" to broadband deployment---"rights of way cost" are not mentioned. The two sentences on page 2 of the letter state in full:

> However, *such procedures* [for rights of way access] *vary* greatly across cities, rights of way owners, and projects--increasing both the cost and deployment time of multi-jurisdictional broadband projects. The *difficulties involved in negotiating and gaining access to the rights-of-way* often prove to be the greatest impediment to the efficient, cost-effective, and timely deployment of broadband. (Italics added.)

The letter only mentions "*difficulties involved in negotiating and gaining access to the rights-of-way*"--not any specific local polices--but suggesting these "difficulties" arise due to *variance in procedures* "across cities, rights of way owners and projects", a very general claim. For instance, how does the variance of a "project" affect the cost, as opposed to *variance* in local policies between jurisdictions? And what are these local "variances"? A host of reasons may require a locality to vary rights of way access, such as geologic conditions (coastal vs. inland), population density (rural vs. urban), types of roads (major thoroughfares vs. neighborhood residential streets), zoning requirements (residential vs. commercial), traffic flow in the area,

coordination with previously scheduled rights of way projects (avoiding multiple street cuts, encouraging joint trenching and collocation), and storm/weatherizing (underground vs. overhead), among them. While the letter may appear to support the notion that variances in local policies significantly impact the cost to rights of way access, how they ***actually*** affect the cost of broadband deployment is not stated at all. There is no specific cost amount, no percentage of increase in cost, not a range of cost increases, not even a specific time delay is provided in the letter. Did these "variances" cause a one week delay? Or a month? And what was the "cost", if any, of this "delay"? No time frame is mentioned; no specifics, no cost analysis is provided. The letter employs only the most general of terms -- "cost-effectiveness". (One could likewise argue that without FCC regulations broadband deployment could be more "cost-effective".) These are alleged variances between local jurisdictions involve but one state, Massachusetts. No data has been presented that these non-specific and vague variances, and whatever problem they may or may not cause, is representative of the all states. Those variances to access and fees do not exist in Texas due to statutory rights of way access and fees, and may not exist elsewhere.

The second sentence on page 109 of the NBP (as cited by NOI) that refers to "deploying a broadband network" and "rights of way" cost states:

> Collectively, *the expense of obtaining permits and leasing pole attachments* and *rights-of-way* can amount to 20% of the *cost of fiber optic deployment*. [Citing NBP, Chap. 6, at 116, endnote 3][11]

This sentence from the NBP and its underlying supporting documentation fails to substantiate the claim that there are local "barriers" to broadband deployed, as asserted in the NOI. The sentence cites, by its endnote 3, to four documents as the basis that "*the expense of obtaining permits and leasing pole attachments* and *rights-of-way* can amount to 20% of the *cost*

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[11] NBP, Chap. 6, Infrastructure, 6.1, at 109. (Italics added).

of fiber optic deployment." The four documents are: a FCC technical paper, a FCC requests for comments, an industry *ex parte* letter and an industry comment. Endnote 3 states in full:

> We [the FCC] derive this estimate from several sources. [1.] Omnibus Broadband Initiative, The Broadband Availability Gap. (forthcoming) [2] *See* Letter from Thomas Jones, Counsel to FiberNet, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket No. 07-245 (Sept. 16, 2009) (FiberNet Sept. 16, 2009 *Ex Parte*) at 20 (noting average cost for access to physical infrastructure of $4,611–$6,487 per mile); [3.] *Comment Sought on Cost Estimates for Connecting Anchor Institutions to Fiber—NBP Public Notice #12*, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice, 24 FCC Rcd 12510 (2009) (*NBP PN #12*) App. A (Gates Foundation estimate of $10,500–$21,120 per mile for fiber optic deployment); [4.] *see also* Letter from Charles B. Stockdale, Fibertech, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 (Oct. 28, 2009) at 1–2 (estimating costs ranging from $3,000–$42,000 per mile).[12]

The NBP's statement of fact that "*the expense of obtaining permits and leasing pole attachments* and *rights-of-way* can amount to 20% of the *cost of fiber optic deployment*" is misleading. Standing alone, the statement implies that the 20 percent cost estimate includes as a significant component rights of way fees. (The NOI seems to have adopted this implication.) None of the four documents cited in endnote 3 support the implication that "the expense of *obtaining permits* … and *rights-of-way*" is a significant component of the "20% of the *cost of fiber optic deployment*." These documents do not discuss rights of way fees. This conspicuous omission of rights of way policies and fees in any of the four documents as a named, contributing component of the cost to build a broadband system, only reinforce their overall insignificant cost in deploying broadband. The Coalition does not ignore that pole attachment fees and pole attachment make-ready cost charged by the owners of the poles (typically private electric or telephone utilities and not cities) which *are* complained of in the documents, can be significant. By examining these four cited documents in detail it becomes demonstrably clear that local

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[12] NBP, Chap. 6, Infrastructure, 6.1, Improving Utilization of Infrastructure, at 116, n.3.

rights of way fees are not a "cost driver" in any of the cost models the FCC used in its studies for wireline broadband deployment.

Review of FCC's Omnibus Broadband Initiative, The Broadband Availability Gap. (OBI Technical Paper No. 1, April 2010):[13] This FCC technical paper does not concern local rights of way cost at all, let alone does it suggest that that rights of way cost are a meaningful cost component of broadband deployment. The technical paper examines the "economic drivers" for several broadband deployment technologies, and to do so they "*collect detailed cost data required to accurately model the build of a network…*"[14]

None of the "collect[ed] detailed cost data" pertain to rights of way cost or polices, as these are not the "economic drivers" of broadband deployment, undermining the NOI's premise of local "barriers". Section IV, "Network Economics", details the various cost models to provide broadband networks. Neither the initial capital expenditure (CAPEX) model nor the on-going operating expenditure (OPEX) cost model includes any reference to local rights of way polices or fees as an "investment cost driver".[15] The technical paper not only lends no support to the NBP or the implied premise in the NOI that rights of way costs are a significant cost item to wireline broadband deployment, it is documented evidence to the contrary, that these cost are not significant.

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[13] Omnibus Broadband Initiative, The Broadband Availability Gap. (OBI Technical Paper No. 1, April 2010) ("OBI Technical Paper No. 1"). At: http://www.broadband.gov/plan/broadband-working-reports-technical-papers.html.

[14] *Id.* Section IV, Network Economics, at 60. (Italics added) And *see* 88, Exhibit 4-AL, "Data Sources for DSL Modeling", which list 24 items of "Material Cost", none of which are local rights of way rental fees. An underlying document to support OBI Technical Paper No. 1, Section IV, "Network Economics", was FCC OBI, Technical Paper No. 2, "Broadband Assessment Model" ("BAM") (CostQuest Associates, March 2010). BAM is on the same website link of the FCC for OBI Technical Paper No. 1, listed under "Documentation").

Review of FiberNet Sept. 16, 2009, ex parte letter: This industry *ex parte* letter concerns pole attachment fees and the related pole attachment make ready cost, *not* local rights of way fees. It lends no support whatsoever to the NBP's conclusions that rights of way and permitting fees are a significant component of the cost to build a broadband network, much less the NOI's incorrect implication that local rights of way costs significantly impact wireline broadband deployment costs.

Review of FCC's National Broadband Plan, Public Notice No. 12 ("NBP PN #12"): NBP PN #12 was a FCC Request for Comments on a specific fiber deployment cost model, the Gates Foundation's per mile cost model for the *total construction cost to install fiber in the rights of way to community anchor tenants (public schools, libraries, and community colleges), with nine specific questions*. Neither the NBP PN #12 nor the Gates Foundation's cost model provide any data on rights of way regulations or fees; they are *not* even a component in the cost model. In the NBP PN #12 there is only one question of the nine, question no. 6, that relates to rights of way issues, but it does not supply any data on rights of way cost. Question no. 6 poses a two-part question:

> To what extent will rights-of-way issues lead to incremental cost not reflected in these estimates [in cost models to build-out to community anchors]? How will rights-of-way issues impact the timelines of build-out to these institutions [community anchors]?

NBP PN #12 lends no support to the NOI's local "barriers" premise.

Review of Fibertech Comments, Oct. 28, 2009 to NBP PN #12: Fibertech's Comments do not claim local rights of way regulations or fees are a significant part of broadband deployment

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[15] BAM, at 28. Rights of way cost were not in the DSL "loop modeling", BAM, Attachment 5.

cost, or that they are "barriers" to broadband deployment. Rather, as Fibertech states, the "fundamental theme" of their comments is on the cost imposed on them by utility pole owners:

> **A *fundamental theme of these comments*** is that *the* ***cost of fiber deployment varies*** dramatically from market to market ***based on the utility policies*** *regarding* ***make-ready work requirements and charges***…..the regional differences in ***utility rules*** severely limit the usefulness of any model that seeks to predict the cost of deploying fiber-optic network on existing utility poles or within existing conduit. (*Fibertech Comments*, at 1, bold and italics added).

The only portions of Fibertech's Comments that mention rights of way issues at all are in its answers to NBP PN #12, question no. 6. But those answers do not support the characterization of the Fibertech's Comments in the NBP.

In its answer to question no. 6, in addressing whether rights of way issues lead to incremental cost not reflected in the cost model estimates to build-out to community anchors -- Fibertech states that right of way issues may be a problem when the anchor tenant is the first user. Fibertech then poses a hypothetical one-time municipal fee, a "what-if" fee that "may" occur. The comments do not state that this one-time municipal fee has been imposed on Fibertech or any other provider by any municipality. The only other reference to rights of way fees is the single general reference to charges and requirements in one state, by one state agency, the New York State Department of Transportation. These types of claims of improperly high charges have been strongly disputed in separate filings at the FCC in the unresolved and still pending 2009 FCC *Level 3 Preemption Petition*.[16] Fibertech's claim of a single instance of alleged "high" rights of way fees, by one state agency, in one of fifty states, in a nation of tens of

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[16] *Level 3 Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253*, WC Docket No. 09-153 (filed July 23, 2009) ("*Level 3 Preemption Petition*") and Opposition of New York State Thruway Authority ("NYSTA") and Opposition of NATOA (both dated October 15, 2009) and Reply Opposition of NATOA, *et al*, and Opposition of the City of Arlington, Texas (both dated Nov. 5, 2009).

thousands of cities, is hardly more than anecdotal. Even assuming arguendo this single situation was accurate, without additional detailed data that it is systemic to all states (and to all cities) it should not be assumed to exist elsewhere in the other forty-nine states. This is particularly true where similar allegations are strongly disputed in a contested, pending case at the FCC. Neither a hypothetical one-time municipal fee nor a sole anecdotal occurrence of alleged higher rights of way fees by one state agency would apply in Texas. In Texas, as detailed below, access to the rights of way is statutorily allowed and rights of way fees are transparently set for virtually all broadband providers.

Fibertech generally acknowledges in answering the second part of question no. 6 that when a city requires work permits and separate agreements, such as franchises, those do not cost or delay fiber projects so long as the municipality "honors the constraints imposed by Section 253 of the 1996 Telecommunications Act." In the context of Fibertech's answer, rights of way issues impact timelines for build-out only if the FCC assumes significant numbers of cities are acting "unlawfully" by not complying with section 253. The FCC cites no data to support its apparent assumption that substantial numbers of cities do not comply with the constraints imposed by section 253. Without systemic documented evidence that cities have failed to comply with section 253 the NOI's reliance on NBP's cited Fibertech Comments to substantiate local barriers to broadband deployment is unfounded.[17]

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[17] Although not referred to in the NOI, there is a third sentence on the next page of the NBP (Page 110) that states that "[t]hese costs can be reduced directly by cutting fees." *That sentence on cost reduction by "cutting fees" is pivotal, yet it has no supporting references in the NBP as to what "cost" or "fees" are being referred to*? While the meaning for both "cost" and "fees" in the sentence is somewhat ambiguous, it appears that the antecedent of "cost" is from the preceding sentence, which states that "cost" are the specific costs "that service providers incur to access conduits, ducts, poles and rights of way on public and private lands." The antecedent for "fees" in the prior sentence states that "fees" are "the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment."

Review of other NOI cited authorities:

Broadband Acceleration Conference: The NOI relies on presentations from the February 11, 2011, Broadband Acceleration Conference to support the premise that local barriers affect broadband deployment. However, with few exceptions, the examples of local rights of way "problems" provided at that industry-dominated conference were general, lacked specifics, with no documented systemic evidence of local "barriers".[18]

Technical Advisory Council ("TAC") recommendations: The NOI relies on the industry populated TAC's recommendations concerning local "barriers" despite the fact that none of the five TAC recommendations listed in the NOI refers to rights of way cost.[19] The TAC March 2011 Presentation referred to in the NOI footnote makes only an unsubstantiated, general statement that "[l]ocal authorities *frequently* assess rates and/or *impose other costs that raise revenues beyond the cost of the rights of way*." (Italics added).[20] This statement is laden with ambiguity? (What does "frequently" mean? What other cost are "imposed"?) Most troubling is that this TAC statement implicitly assumes that "*other costs … beyond the cost of the rights of way*" are inherently prohibited based on an erroneous assumption that the *de jure* benchmark for

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But as these Comments have already shown those "costs" and "fees" do not include a named component of rights of way use rental fees as part of the 20 percent of total fiber network construction cost. The only "cost" and "fees" to cut that the NBP could be referring to are utility pole owners' pole attachment and make-ready fees. Rights of way rental fees are not the problems cited in the NBP and should not be part of the "solutions" arising out of this NOI.

[18] NOI ¶ 8, n.23. The Broadband Acceleration Conference's 20 presenters were from the industry or were technical presenters, except for two from local governments. *See* FCC Public Notice, FCC DA 11-241, Released Feb. 8, 2011 on the Conference Agenda.

[19] NOI, n.26. TAC is "a working group of industry and technical leaders", with no local government members. NOI note 26 refers to "rate development", although ambiguous, appears to concern pole attachment rates, not rights of way fees, based on the TAC March 30, 2011 Presentation, slide 12. At: http://www.fcc.gov/oet/tac/TACMarch2011mtgfullpresentation.pdf. ("TAC March 2011 Presentation").

[20] TAC March 2011 Presentation, slide 15.

rights of way use rental fees is "the cost of the rights of way", it is not.[21] "Cost" is not the benchmark paid as local rights of way use rental fees in Texas. Texas rights of way are public property. Since 1876, the Texas Constitution has prohibited a private entity from using public property unless it pays fair market value as compensation for that private use. Otherwise, the free use is an unconstitutional gift -- a tax payer subsidy -- to the private entity (as discussed in detail, *supra*).

The FCC must disavow TAC inflammatory statements: The TAC March 2011 Presentation contained an inflammatory characterization of local government actions across the country. TAC stated as "fact" (without any documented support) that "[l]ocalities delay negotiations until providers concede to payment or abandon practices."[22] This TAC statement is no less than a branding of all "localities" as blackmailers—and as such, it is repugnant. Local governments, just like the FCC, are custodians of the public's trust, and they take that responsibility seriously, particular when it involves safeguarding the private use of a scarce resource, public rights of way. The FCC should disavow these kinds of unsubstantiated, gratuitous, and inflammatory comments. Such statements lack any probative value and have no place in a FCC-sanctioned presentation or in this proceeding. Unless the FCC disavows this

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[21] Using the term the "cost of the rights of way" as a benchmark also begs the question of what the "cost of the rights of way" includes, i.e., does it include *all* cost, such as the purchase price for rights of way, remedial cost to repair and replace roads sooner than normally required after multiple street cuts by private entities installing fiber, the real cost of traffic delays to citizen, the real cost of additional police cost to route traffic around construction areas, for instance, the disruption, let alone damage, to city underground infrastructure of water, sewer and drainage and all administrative cost in permitting, inspecting and negotiating use agreements to allow private use for profit of public property. The rights of way cost studies submitted in the Comments by NLC, *et al.* incorporated by reference, which detail the kinds and array of cost incurred by cities arising from the private use of public rights of way to the exclusion of the public.

[22] TAC March 2011 Presentation, slide 15.

unfounded statement, the FCC will be perceived, to its discredit, as relying on these types of statements.

Fortunately, TAC's April 22, 2011, Report to the Chairman of the FCC, post-NOI, included no such inflammatory statements. Significantly, *none of the eight TAC "official" recommendations contains a single reference to rights of way fees or regulations as "barriers" to broadband deployment*.[23] On the contrary, to TAC's credit, TAC chose to encourage collaboration between the industry, the FCC and local governments. TAC Recommendation No. 4 stated that "[t]he FCC should begin a dialogue with states and municipalities about proven new technologies for efficiently deploying broadband." The Coalition agrees with this collaborative approach and wholeheartedly encourages such a dialogue.

2. Contrary to the NOI's implicit premise that local rights of way regulations and compensation are "barriers" to broadband deployment, Texas and FCC national broadband deployment studies show broadband deployment is higher in in cities, not lower.

If local rights of way regulations or non-cost based rights of way use fees were "barriers" to broadband deployment that would manifest itself with lower deployment in those areas with more extensive local regulations, the urban areas, or in those states with non-cost based rights of way use fees. But that is not what broadband deployment studies have shown; in fact, they have shown the exact opposite has occurred. Texas and nationally broadband deployments studies contradict the FCC's premise that areas with local rights of way regulation are 'barriers" to broadband deployment. These *broadband deployment studies, several of which were cited or authored by the FCC in the NBP, have consistently and conclusively documented that broadband*

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[23] Technical Advisory Council Chairman's Report, from Tom Wheeler, Chairman, Technical Advisory Council, to FCC Chairman Genachowski, April 22, 2011 (FCC Doc-306065A1.doc).

deployment is generally greater in urban areas, not lower. Several of those broadband studies will be reviewed in these Comments. From this review of the studies it becomes clear that there is no broadband deployment problem in urban areas due to local regulations or fees for the FCC to "fix" by implementing the NOI's proposed "solutions."

Two recent Texas broadband reports refute and contradict the NOI's premise that local regulations are "barriers" to broadband deployment.

2011 PUC Report:[24] Every two years, the Public Utility Commission of Texas ("PUC") issues a detailed, comprehensive report to the Texas Legislature on the "Scope of Competition in Telecommunications Markets of Texas." In recent years that PUC legislative report has included a review of the broadband market in Texas. Texas enjoys the second highest broadband penetration rate of any state in the nation, with its rate increasing 254 percent from 2005 to 2008.[25] According to the report, broadband deployment is greatest in the urban areas of Texas. The report documents a high correlation between low broadband subscribership in low income and in non-urban areas, *not* in urban/city areas.[26]

2011 Connected Texas Report:[27] The 2011 Connected Texas Report shows that broadband service, in the aggregate, reaches 96.63 percent of Texas homes using the NTIA/FCC

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[24] 2011 Public Utility Commission of Texas Report to the 82nd Texas Legislature: Scope of Competition in Telecommunications Markets of Texas ("2011 PUC Report"), at 16-28. At: http://www.puc.state.tx.us/telecomm/reports/scope/2011/2011scope_tele.pdf.

[25] *Id.* at 16. n.29, citing the FCC.

[26] *Id.* at 25-28, in part citing FCC for income and density data.

[27] Connected Texas: The Broadband Landscape in the State of Texas (March 2011) ("2011 Connected Texas Report"). This is a detailed data rich report, funded by a Congressional grant to the Texas State Broadband Data and Development program. The final report was submitted to the National Telecommunications and Information Administration. It may be found at: http://www.connectedtx.org/_documents/CTX_PlanningReport_Final_web.pdf.

definition of "broadband."[28] However, for purposes of the NOI and where broadband deployment needs to be examined, the real story is the disparity between broadband availability in rural and urban areas. The broadband availability rate is *83.82 percent in rural areas (with less local regulation)*, while in *urban counties (with more local regulations* in the larger cities), it is substantially higher, exceeding *99.22 percent*.[29] Even more striking is that in a substantial number of large urban counties the broadband availability rate is 100 percent (containing the cities of Denton, Ft. Worth, Lubbock, Plano, New Braunfels, and San Marcus).[30] Broadband availability rate is particularly high in urban counties due to high cable broadband availability.[31] This high urban cable broadband deployment rate is a direct result of local governments negotiating cable franchises decades ago that required cable operators to build their cable systems city-wide, as discussed below. The FCC should look to what cities have accomplished with flexible, city-wide build-out as a model to replicate across the nation to accelerate broadband deployment. The report concludes that the "areas across Texas that remain unserved or underserved by broadband service are overwhelmingly rural."[32] The FCC should focus its efforts on those areas, where broadband deployment is lowest.

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[28] *Id.* at 3-4. Under the current NTIA/FCC broadband definition, speeds of 768 Kbps or above constitute broadband.

[29] *Id.* Table 10, "Broadband Availability Across Rural, Suburban and Urban Counties." at 36. "*Broadband inventory* at the 768 Kbps and 3 Mbps or above download speeds are *significantly higher in urban and suburban counties than across rural counties*." at 36 (Italics added).

[30] *Id.* Table 9, "Broadband Service by County, Terrestrial Broadband (Excluding Mobile)." at 24-33.

[31] *Id.* Table 8, "TARC [Texas Association of Regional Councils] Broadband Availability by Platform…" at 22; Table 11, "Broadband Availability by Platform for Rural, Suburban and Urban Counties…" at 37; Table 12, "County-Level Broadband Availability by Platform……" at 37-48.

[32] *Id.* at 16.

National studies contradict the NOI's premise that local "barriers" exist to broadband deployment: Several FCC-promulgated plans and reports, including the NBP, its underlying documentation, and the post-NOI FCC Seventh Broadband Progress Report contradict the NOI's premise that local rights of way policies, regulations, and compensation constitute "barriers" to broadband deployment. These FCC authored documents provide detailed data that demonstrably reflect broadband deployment is at its highest in urban areas. The only exception occurs in low-income areas, a direct result of deliberate, unilateral economic decisions made by broadband providers.

The NBP itself plainly and unequivocally concludes that "[t]his broadband availability gap is greatest in areas with low population density."[33] Likewise, the OBI Technical Paper No. 1, states that "… *the deployment problem is one that predominantly exists outside of urban areas*."[34] For example, the "unserved" in urban areas is 1 percent, as opposed to 20 percent in all other areas.[35]

Moreover, comparing these conclusions in the broadband deployment studies with state-by state studies of rights of way regulations on fees and permitting cited in the NBP further demonstrates the lack of any correlation between rights of way regulations and fees and low broadband deployment:

> Many states have limited the rights-of-way charges that municipalities may impose, either by establishing uniform rates (Michigan) or by limiting fees to administrative costs (Missouri). [Endnote 34, citing, NTIA, Rights-of-Way Laws by State (2003); and National Association of Regulatory Utility Commissions (NARUC) Promoting Broadband Access Through Public Rights-of-way and

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[33] NBP, Chap. 8, at 136. *See also*, at 157, n.8 and OBI Technical Paper No. 1, Chapter 2, at 17-31.

[34] OBI, The Broadband Availability Gap, Technical Paper No. 1, statistics in Exhibit 2-E, at 20. (Italics added).

[35] *Id.*

> Public Lands (July 31, 2002).] Other states, including South Carolina, Illinois and Florida, do not allow municipalities to collect rights-of-way fees directly; instead, the state compensates local governments for the use of their rights-of-way with proceeds from state-administered telecommunications taxes.[36]

The OBI Technical Paper No. 1, Exhibit 2-B, "Availability of Broadband Networks Meeting the National Broadband Market," has a color-coded map of the "Conterminous United States."[37] Darker blues show greater availability of broadband, yellows and lime green show less, and darker reds show low availability of broadband. The Exhibit 2-B map shows graphically nation-wide where serious broadband deployment problems persist, and where they do *not*.

An overlay comparison between this color-coded, national broadband deployment map with the 2002 NARUC report (on rights-of-way access regulations and compensation) and the 2003 NTIA review (on rights of way statutes fees and regulations) clearly demonstrates that states with "cost-based," low, or no rights of way fees with "fast track" statutory rights of way access (such as Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Minnesota, Missouri, Nebraska, N. Dakota, Ohio, S. Carolina, and Utah) have no greater broadband deployment than states with "higher" fees or "greater regulations"[38] While it has all but risen to the level of an industry myth that there is a correlation between lower broadband deployment and local regulations, like the other industry myths concerning local regulations, it is a myth with no factual basis, and as such, it is a myth the FCC must reject.

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[36] NBP, Chap. 6, at 113. *See also* at 117, nn.33, 34 & 38.

[37] OBI Technical Paper No. 1, Exhibit 2-B, at 18.

[38] *See* NARUC, Promoting Broadband Access Through Public Rights-of-way and Public Lands (July 31, 2002), as cited in FCC NOI, n.12 and the 2003 NTIA, Rights of Way Laws by State, *available at* http://www.ntia.doc.gov/ntiahome/staterow/rowtableexcel.htm., as cited in NOI, ¶ 35, n.39. In 2003 the NTIA also summarized the "Best practices" on rights of way policies. *See* NTIA, State and Local Rights of Way Success Stories (2003), a*vailable at*: http://www.ntia.doc.gov/ntiahome/staterow/ROWstatestories.pdf. Both the NTIA Reports and the NARUC Report are cited in NBP, Chap. 6, at 113, and endnotes 33, 34 and 38.

Six weeks after the NOI was released, the FCC released its Seventh Broadband Progress Report.[39] This report likewise concludes that broadband deployment problems do not lie in urban areas:

> The data also show that, unsurprisingly, unserved Americans tend to live outside of the "urban core" areas and tend to reside in areas with a lower level of population density than served areas. [FN 149 omitted][40]

All of the foregoing reports contradict the NOI's premise that local rights of way regulations and processes are "barriers" to broadband deployment. They also contradict the premise that "market based" compensation, as required by the Texas Constitution, constitutes a "barrier." As shown in the referenced reports, the assertion that local regulations are barriers to broadband deployment has no factual basis. The Coalition is confident that the FCC will recognize this deficiency and its implications for the NOI. As stated earlier, there is no urban broadband deployment problem due to local regulations or fees for the FCC to "fix".

B. Local Rights of Way Regulations have Enhanced and Accelerated Broadband Deployment in Cities.

The significantly higher broadband deployment Texas cities enjoy is not mere happenstance. Texas' local elected officials know that higher broadband deployment in Texas cities results directly from local government's forward thinking actions years ago. For example, because Texas cities required a city-wide build-out of cable television systems decades ago, cable broadband is now ubiquitous in those cities. The 2011 Connected Texas Report documents

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[39] FCC Seventh Broadband Progress Report and Order on Reconsideration, FCC 11-78, GN Docket No. 10-159 (May 20, 2011).

[40] *Id*. ¶ 42, at 23.

that fact: broadband availability exceeds 99 percent in urban counties, which is exactly where city-wide cable system build-out was required by local cable franchises.[41]

Texas also enjoys robust broadband competition because Texas cities allowed quick and reasonable access to the rights of way, at reasonable rental rates, in the late 1990's. Texas cities did so after the telecommunication industry was deregulated in the mid 1990's (first by Texas in 1995[42] and then by Congress in February 1996[43]). This, in turn, permitted greater broadband deployment by multiple providers into the new millennium.

Access to and compensation for local public rights of way was updated and revised in Texas for telecommunication providers in 1999[44] and for cable and video providers in 2005.[45] As discussed in detail below, these two statutes allow fast-track access to the local public rights of way that preserves Texas cities' local rights of way management police powers and provide for a statutory local rights of way use fee. These elements define accessibility and predictability that favor broadband deployment in Texas.

The 2011 Connected Texas Report details broadband availability by platform across three metrics: (1) geographic regions of Texas (Table 8, at 22); (2) rural, suburban and urban counties, collectively (Table 11, at 37); and (3) by individual counties (Table 12, at 37). All three metrics

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[41] 2011 Connected Texas, Table 8, "TARC [Texas Association of Regional Councils] Broadband Availability by Platform…" at 22; and Table 11, "Broadband Availability by Platform for Rural, Suburban and Urban Counties…" at 37; Table 12, "County-Level Broadband Availability by Platform……" at 37-48.

[42] Tex. Civ. Stat. art. 1446c-0, the Public Utility Regulatory Act of 1995, now recodified in the Tex. Util. Code, principally in Title 2, Public Utility Act, Subtitle C, Telecommunication Utilities.

[43] 1996 Federal Telecommunication Act (47 U.S.C. § 151, *et seq*.) ("1996 FTA").

[44] Tex. Loc. Gov't Code, Chapter 283. ("Chapter 283" or "1999 Texas Telecommunications Access to Local Rights of Way Statute").

[45] Tex. Util. Code, Chapter 66. ("Chapter 66" or "2005 Texas Cable Franchising Statute").

show that broadband deployment, with cable as the platform, stands significantly higher in urban areas at 91.81 percent compared to rural areas at 44.72 percent (Table 11). Table 11 of the report also shows that statewide cable broadband *equals* DSL broadband, at 86.17 percent. That cable broadband equals DSL statewide, with DSL being provided by the century old, incumbent local exchange carriers, further validates that city-wide build-out in cable franchises accelerated and enhanced broadband deployment in Texas. Clearly, the stark distinction between cable broadband in rural Texas versus urban Texas, and the astonishing statistic that cable broadband deployment statewide is equal to DSL broadband, is due in large part to cities requiring cable providers in the 1970's and 1980's to implement city-wide build out of cable systems. New cable market entrants continue to be active in Texas.[46]

II. COMMENTS ON WHETHER LOCAL WIRELINE RIGHTS OF WAY REGULATIONS AND POLICIES ARE "BARRIERS" TO BROADBAND DEPLOYMENT.

> No man has the right to use a street for the prosecution of his private business ... Not having the absolute right to use streets for the prosecution of private business … is a self-evident proposition, for, if it were not so, sidewalks and streets could be rendered impassable by those vending their wares or soliciting patronage. *Green v. City of San Antonio*, 178 S.W. 6 (Tex. Civ. App.-San Antonio 1915, writ denied).

As posed, many of the NOI questions challenge cities to prove a negative. Cities are requested to "prove" that their local rights of way regulations and policies are not 'barriers" to broadband deployment. This is absent any evidence that Texas cities have erected "barriers" to broadband deployment. Texas and national broadband deployment studies, discussed above, show the opposite is true. Texas cities have been instrumental in facilitating broadband deployment while exercising reasonable rights of way management under Texas law.

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[46] *See* 2011 PUC Report, Table 2, at 18.

The legal authority for Texas cities to manage and control local public rights-of-way began with Texas statutes in 1858.[47] This authority remains the law today.[48] Value-based compensation for private use of public property, including rights of way, has been constitutionally required in Texas since 1876, as discussed in detail below.[49]

Access to and compensation for use of the local public rights of way was updated and revised in Texas twelve years ago for telecommunication providers with the enactment of the 1999 Texas Telecommunications Access to Local Rights of Way Statute and six years ago for cable and video providers with enactment of the 2005 Texas Cable Franchising Statute. Both of these statutes allow prompt access to the local public rights of way, without a locally required franchise, subject to municipalities' rights of way management police powers, with statutory, value-based, rights of way rental fees.

A. Texas Statutory Access to Local Rights of Way: Transparent and Timely.

1. 1999 Texas Telecommunications Access to Local Rights of Way Statute.

The 1999 Texas Telecommunications Access to Local Rights of Way Statute allows full and prompt access to local rights of ways for virtually all telecommunication providers,[50] while

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[47] Acts of 1858, 7th Leg., p. 69, ch. 61, sec. 17. This Act was construed by the Texas Supreme Court eleven years later with the Court upheld a city ordinance prohibiting the running of hogs in the streets; classic, narrowly tailored, local rights-of-way management in its very earliest form. *City of Waco v. Powell*, 32 Tex. 258, 272 (Tex. 1869).

[48] In 1875 Texas cities were given "the *exclusive control and power over the streets, alleys and public grounds and highways of the city*…" Acts 1875, 14th Leg., 2nd C.S., p. 113, § 32. Recodified many times, now codified in the Tex. Transp. Code, §§ 311.001 [home rule city] and 311.002 [general law city]; and see also, Tex. Civ. Stat. art. 1175 [home rule city] granting cities, as in 1875, "*exclusive control over the highways, streets, and alleys of the municipality.*"

[49] Tex. Const. art. III, § 52 (a) and Tex. Const. art. XI, § 3.

[50] As Chapter 283 applies to both PUC Certificated Telecommunication Providers ("CTP"), and non-PUC certificated wireline "voice service" providers, for purposes of Chapter 283, these comments will use "telecommunication provider" and "CTP" interchangeably. In 2005 the Texas

preserving flexibility for local rights of way regulations. **The following key provisions in Chapter 283 relate to access to local rights of way for all telecommunication providers in compliance with the access line reporting and compensation requirements of Chapter 283:**

- Telecommunication providers have immediate, full, and prompt access to "erect poles or construct conduit, cable, switches, and related appurtenances and facilities and excavate within a public right-of-way." (§ 283.052 (a) (1)).
- Telecommunication providers are "not subject to municipal franchise requirements." (§ 283.052 (a) (2)).
- Municipal police powers to manage the public rights-of-way are expressly preserved. (§§ 283.001 (b) (1) and 283.056 (c)).[51]
- A city may require a no-cost construction permit. (§ 283.056 (b)).
- A city is to promptly process permits and to avoid delays. (§ 283.056 (d)).

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legislature reaffirmed that compensation for use of the rights of way by telecommunications providers would be technology-neutrality when it recognized the increasing trend of Internet–based "voice services" being provided by non-PUC certificated providers through wireline facilities in the rights of way by amending Chapter 283 to include these "non-certificated" wireline "voice service" providers. Acts of 2005, 79th Tex. Leg., 2nd C. S., Ch. 2, § 28, eff. Sept. 1, 2005 [S.B. 5] (Italics added). The 2005 amendment revised the definition of a CTP to include "a person that provides voice service", with "v*oice service*" being broadly defined to mean any "voice communications services … through wireline facilities located at least in part the public right-of-way, *without regard to the delivery technology, including Internet protocol technology*". Chapter 283, § 283.002 (2) [defining "CTP"] and (7) [defining "voice services"]. Therefore, since 2005 a wireline voice service provider could be a Chapter 283 "CTP", whether or not they were certificated by the PUC, including wireline "facility-based" VoIP providers. *See PUC Order Implementing SB 5 and modifying the definition of an "access line"*, P.U.C. Project No. 33004, (Dec. 14, 2006).

[51] But a city may not require a CTP to: have an office in the city, provide business records, except as they relate to rights of way use and fee compliance or to obtain any approval of transfers, except for notice and new contacts. Chapter 283. § 283.056 (c) (1)-(4)). There is also a standardized statutory indemnity liability provision. Chapter 283. § 283.057.

With its adoption, Chapter 283 carefully balanced the interest of the industry with the needs of cities. Chapter 283 established a streamlined, fast-tracked access to local rights of way process, while allowing cities, as custodians for *all* the public, to promulgate local, non-discriminatory, rights of way regulations to insure the viability of rights of ways use by both the industry and the public-at-large.

It should be noted that before this statutory change there were no local "barriers" to competitive providers gaining access to local rights of way. During the four year period between 1995, after telecommunication deregulation in Texas and before the adoption of Chapter 283 in 1999, Texas cities granted literally hundreds of local franchises to facility–based telecommunications providers, as discussed *infra*.[52]

2. 2005 Texas Cable Franchising Statute.

The Texas legislature first addressed cable television provider's access to the public rights of way in 1983 by granting to them, in unincorporated areas, rights of access to install and maintain equipment in the public rights of way, subject to the requirement that the installation and maintenance did "not unduly inconvenience the public using the affected property."[53] One year later, the federal 1984 Cable Act was adopted setting the parameters on local franchises.[54]

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[52] On number of CTPs pre-1999, *See* 2005 PUC Report to the 79th Legislature: Scope of Telecommunications Markets of Texas, Table 1, p. 2. As of May 2011, there were 63 ILECS and 469 CLECs. At: http://www.puc.state.tx.us/telecomm/directories/index.cfm.

[53] Acts of 1983, 68th Leg., p. 3234, ch. 556 [SB 643], originally codified at Tex. Rev. Civ. Stat. art. 9021, now codified in Tex. Util. Code, §§ 181.101-104. *Marcus Cable Associates, L.P., d/b/a Charter Communications, Inc v. Krohn*, 90 S.W.3^{d} 697 (Tex. 2002) held that § 181.102 granted cable companies only the right to install cable lines in a public "utility easement" not in private utility easement.

[54] The Cable Communications Policy Act of 1984 (the "1984 Cable Act"), as amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and

Federal Cable Law provides the overriding guidance for the terms in local cable television franchises, i.e., that: (1) cable services cannot be provided without a cable franchise[55] granted by a "franchising authority;"[56] (2) rights of way compensation is value-based at no more than 5% percent of gross revenue;[57] and (3) cable providers are granted rights of access to use public rights of way, subject to several exceptions which are relevant to this discussion.[58]

> …in using such easements the cable operator shall ensure –
>
> (A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
>
> (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
>
> (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator. [59]

In 2005, Texas was one of the first states in the nation to enact a streamlined, statewide cable and video franchising process, the 2005 Texas Cable Franchising Statute.[60] And this statute

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by 1996 FTA, (collectively, "Federal Cable Law"). 47 U.S.C. § 521, *et seq*. *See American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1558 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988) that discusses the history of FCC and municipal cable regulation prior to the 1984 Cable Act.

[55] 47 U.S.C. § 541(d).

[56] 47 U.S.C. § 522(10), defines "franchising authority" as "any governmental entity empowered by Federal, State, or local law to grant a franchise." In Texas, until 2005, cities were the "franchising authority". Tex. Civ. Stat. Art. 1175; Tex. Transp. Code § 311.071. Authority to Grant Franchise [Home Rule].

[57] 47 U.S.C. § 542(b) "…franchise fees . . . shall not exceed 5 percent of [the] cable operator's gross revenues derived . . . from the operation of the cable system to provide cable services."

[58] 47 U.S.C. § 541 (a) (2) "…. franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements ….which have been dedicated for compatible uses…"

[59] *Id.*

[60] The day after its effective date the state association of incumbent cable providers filed suit in federal court asserting that Chapter 66 was unlawful on a number in grounds, including the

was enacted only after extensive negotiations among the various stakeholders, including cities, competitive providers and incumbent telecommunication providers. After its adoption Verizon, as a competitive cable provider, filed favorable comments with the FCC concerning the new Texas law:

> [T]he State of Texas recently enacted legislation that permits video services (sic) providers to obtain authorization from the state to provide video services in place of individually negotiated, local franchises. Verizon applauds any such efforts to streamline the cumbersome franchising process, and anticipates that the result will be accelerated deployment of competitive video services in the state.[61]

The FCC has also noted that the new Texas legislation was among "recent efforts at the state level [that would] … facilitate entry by competitive cable providers." [62]

Under the 2005 law, the state, acting through the PUC, replaced cities as the exclusive franchising authority in Texas for cable services and video services.[63] Previously franchised local incumbent cable service providers (the provider with the largest number of subscribers in the

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legislative transitioning tool of "grandfathering" unexpired cable franchises. *Texas Cable & Telecommunication Association v. Commissioners*, Case No. 05-CV-721, (W. Dist. Tex., U.S. Dist. Ct., Austin). TCCFUI, AT&T, Verizon and Grande Communications intervened to defend the statute. Time Warner Cable joined later as a plaintiff. In 2006 the suit was dismissed for "ripeness" (458 F. Supp. 2d 309), but on appeal it remanded back to the U.S. District Court. *Texas Cable & Telecommunications Ass'n v. Hudson*, 265 Fed. App'x. 210 (5th Cir. 2008), *cert. denied sub nom. SWBT v. TCA*, 129 S.Ct. 146 (2008). On remand the Court upheld Chapter 66 in its entirety, including the grandfathering. *TCTA v. Hudson, et al*, A-05-CA-721-LY (Oct. 29, 2010). That 2010 decision is now pending appeal at the Federal Fifth Circuit Court of Appeals, *TCTA v. Hudson, et al*, No. 10-51113.

[61]Verizon Comments, September 19, 2005, at 7, n.8, as filed *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255.

[62] *In the Matter of implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992*, MB Docket No. 05-255, *Notice of Proposed Rulemaking*, 20 FCC Rcd 18581, ¶ 9. (November 18, 2005) ("*2005 Cable Franchising NP*RM").

[63] Chapter 66. § 66.001.

city) were legislatively grandfathered, and allowed to operate unaffected until their local franchise expired, when they could apply for a PUC-issued franchise.[64]

Not only did the state law dramatically streamline the cable franchising process by standardizing an abbreviated cable franchise application submitted to one state agency, it also established uniform, state-wide requirements for the new, state-issued cable franchises. **The following key provisions in Chapter 66 relate to ease of access to local rights of way:**

- The state-issued cable franchise applicant "agrees to *comply with all applicable municipal regulations regarding the use and occupancy of public rights-of-way…including the police powers of the municipality…*" (§ 66.003 (b) (3) emphasis added).
- A PUC state-issued cable franchise (PUC "certificate of franchise authority") is granted within 17 business days. (§ 66.003(b)).
- PUC "certificate of franchise authority" *grants* authority to:
    - to provide cable or video service
    - "*to use and occupy the public rights-of-way* in the delivery of that service"
    - "*subject to …the police powers of the municipalities…*" (§§ 66.003 (c) (2) and 66.010, emphasis added)
- City police powers to manage the public rights-of-way are preserved (§ 66.0011 (a)).[65]

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[64] *Id.*, § 66.004. Chapter 66. § 66.004 was recently amended, effective September 1, 2011, to allow unilateral termination by cable providers of all unexpired cable franchises in Texas cities of less than 215,000 (estimated to be over 400), leaving only four local franchises grandfathered until they expire, absent a negotiated early termination. Acts of 2011, 82nd Tex. Leg., R.S., ch.__, §__, eff. Sept. 1, 2011 (S.B. 1087).

[65] But a city may not require: Offices in the city; business records, excerpt as they relate to rights of way use and fee compliance, approval of transfers, except for notice and new contacts; bonds for aerial construction, but can require defense and claim parity for self-insurers. Chapter 66. §

- A city may require a no-cost construction permit. (§ 66.011 (b)).
- A city is to promptly process permits and to avoid delays, with exceptions for emergency repairs. (§ 66.011 (c) and (d)).
- City-wide build-out requirements are prohibited. (§ 66.007).

With its adoption, Chapter 66 addressed a number of the industry objections to achieve an efficient, streamlined cable franchising process,[66] while retaining and preserving a city's local police powers to regulate and manage its rights of way with reasonable standards.

Texas is a state with over a thousand cities that had for decades before the 2005 statutory transition to PUC-granted cable franchises negotiated local cable franchises. There have been and remain no barriers to broadband deployment in Texas with its historic ease of access to use the local rights of way.[67]

B. Texas Rights of Way Charges are Reasonable.

The NOI's discussion of "rights of way charges" intermingles incongruent types of rights of way fees. The NOI inquires about reasonableness of "rights of way charges", "permitting fees", and "administrative cost". But it poses these questions in context of "market based rates", "per-foot or percentage of revenue", "identifiable cost", "processing fees", "recurring and non-recurring charges", and "recovery of cost", as if they were all the same.[68] The NOI, in posing the questions in this manner, inadvertently, combines fundamentally different types of fees related to

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66.011 (a) (1)-(5). And there is a standardized, statutory, indemnity liability provision. Chapter 66. § 66.012.

[66] Verizon Comments, at 19-25.

[67] As of May 2011 there were 63 active cable/video providers (some acting though D/B/As), listed at: http://www.puc.state.tx.us/cable/directories/index.cfm.

rights of way use without distinction between them. There are different underlying legal and policy basis for each type, and no meaningful discussion may ignore those distinctions.

There are two general types of charges related to the private use of public property, including use of local rights of way. The type of charge depends on whether the city is acting as a property owner, effectively renting property, or in its administrative capacity, administering the process. The two types of charges related to the private use of public rights of way are:

- **City as a property owner - Value-based charge**: The city, as a property owner, receives value-based rental payments for private use of public property, including public rights of way.
- **City as a governmental entity - Cost-Based Charge**: The city, as a governmental entity, acting with its police-powers in an administrative capacity, charges cost-based fees to recover the cost for administering the process of its oversight for the private use of public property to avoid tax subsidies.

The Coalition's Comments on "rights of way charges" (in the vernacular of the NOI), will focus on the city "rights of way charges" with the city as a property owner, i.e., receiving value-based rental charges paid for the private use of the rights of way; and not the city's police–power cost-based, administrative fees related to the permitting and application process to use the rights of way use.

1. Value-based compensation for private use of local public rights of way is required by the 1876 Texas Constitution and subsequent enabling statutes.

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[68] NOI ¶ ¶ 16-20, "Reasonableness of Charges" and ¶ ¶ 21-23 "Qualitative Information".

The constitutional requirement for value-based compensation for the private use of public property arises directly from the 1876 Texas Constitution, art. III, § 52 (a) and art. XI, § 3.[69] These Texas Constitutional provisions prohibit governmental entities (e.g., cities) from making "gifts of public property." A gift includes allowing the use of public property to any entity for less than market value.[70] In 1913, the Texas legislature adopted the statutory enabling act for the Home Rule Amendment to the Texas Constitution which details a home rule city's police powers and authority to receive rights of way use rental compensation.[71]

In a challenge to these home-rule powers nearly a century ago, the Dallas Court of Appeals upheld a city's right to charge a value-based payment for use of local streets by a local telephone company. The Court relied on an 1893 U.S. Supreme Court decision:

> …the city possesses ample power under its present charter to make the charge for the use and occupancy of the streets …..The exact question has been determined by the Supreme Court of the United States…[72]

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[69] Tex. Const. art. III, § 52 (a) "the Legislature shall have no power to authorize any …. city, town … to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever ….." Tex. Const. art. XI, § 3 "No ….city, or other municipal corporation shall hereafter … make any appropriation or donation to the same, or in anywise loan its credit…." These constitutional provisions were a direct response to prevent a repeat of the dire financial consequences to local governments that had improvidently granted use of public property without value-based compensation to the then nascent railroad industry in the 1860s and 1870s.

[70] In construing a similar prohibition applicable to the State, the Texas Supreme Court stated: "a gift or loan of the credit of the state ….amounts to a grant of public money in violation of Article III, Section 51. The purpose of this section and of Article XVI, Section 6, of the Constitution is to prevent the application of public funds to private purposes; in other words, to prevent the gratuitous grant of such funds to any individual or corporation whatsoever….." *State v. City of Austin*, 331 S.W.2d 737,742 (1960).

[71] Acts 1913, p. 307. Tex. Civ. Stat. art. 1175, "A home-rule municipality has the following powers….. [t]o prohibit the use of any street, alley, highway or grounds of the city by any …..telephone…. company….without first obtaining the consent of the governing authorities … and upon paying such compensation as may be prescribed ….."

[72] *Southwestern Tel. & Tel. v. City of Dallas*, 174 S.W. 636, 641-42 (Tex. Civ. App. 1915, writ refused), citing, *St. Louis v. Western Union Tel. Co.*, 149 U.S. 465 (rehearing, 1893) ("*U.S. Sup. Ct., St. Louis, reh*. (1893)").

The Texas Supreme Court expressly approved the Dallas case when it upheld local value-based rights of way fee as a "rental" fee, not an unlawful "tax."[73] In 1975, the Texas legislature enacted the Public Utility Regulatory Act and included in it a provision to preserve a city's right to franchise the use of streets and to charge for that use.[74] With the deregulation of telecommunications services in 1995, the Texas legislature enacted a similar clarifying provision specific to telecommunication providers to protect "*a municipality's historical right to control and receive reasonable compensation for access to the municipality's public streets....*"[75]

2. Texas Statutory rights of way charges: Transparent and reasonable.

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[73] *Fleming v. Houston Lighting and Power*, 138 S.W. 2d 520, 522 (Tex. 1940) ("*Fleming I*") upheld a 4% gross revenue fee as a proper rights of way rental charge, "….cities have the right to fix charges in the nature of rentals for the use of their streets and other public places by telephone companies conducting a local business." *Fleming v. Houston Lighting and Power*, 143 S.W.2d 923, 924 (Tex. 1940) ("*Fleming II*") On rehearing on the question of whether this payment was an unlawful "tax" or a street "rental" payment the court stated: "The authorities recognize a distinction between a rental charge and a tax or charge for the privilege of doing business." And held the payment was "in the nature of a rental" payment", *not* a "tax", citing the "leading case" of *St. Louis v. Western Union Tel. Co*., 148 U.S. 92 (1893) ("*U.S. Sup. Ct., St. Louis* (1893)"). *See also*, Tex. Atty. Gen. Op. H-1265 (1978) (State agencies must pay the municipal charge on telephone bills, as it is a rental payment, there is no "tax" exemption); Tex. Atty Gen. Op. JM-16 (1983) (municipal fee may be passed through to the county as a customer as it is a rental payment; there is no "tax" exemption).

[74] Acts 1975, 64th Leg., ch. 721. ("PURA 1975"), Tex. Civ. Stat. Art. 1446c, § 21, Recodified in 1997 as Tex. Utilities Code, § 14.008. "This *title does not restrict the rights and powers of a municipality to grant or refuse a franchise* to use the streets and alleys in the municipality or to make a statutory *charge for that use*." (Emphasis added).

[75] Acts of 1995, 75th leg., ch. 231, ("PURA 1995"), sec. 29, codified as Tex. Civ. Stat. art. 1446c-O § 3.2555 (f), and recodified in 1997 in Tex. Util. Code, § 54.205. "Municipality's Right to Control Access." *See also, Southwestern Bell v. City of El Paso and the El Paso County Water Improvement District, Number 1*, 168 Fed. Supp. 2nd 640, 648 (2001) a city, unlike the water district, is "not limited in terms of their ability to "control and receive compensation for access to the municipality's public streets…" citing Tex. Util. Code § 54.205.

As discussed above, in 1999 the Texas legislature adopted Chapter 283 concerning fees paid for use of the rights of ways by PUC Certificated Telecommunication Providers,[76] and since 2005, all wireline "voice service" providers.[77] The 1999 statute was carefully crafted to implement a new municipal rights of way compensation methodology that applies equally to traditional Incumbent Local Exchange Carriers ("ILECs") and the new Competitive Local Exchange Carriers ("CLEC"), including both CLECs with facilities in the rights of way ("underlying CTPs") and those reselling services or using others' facilities ("reseller CTPs").[78] Chapter 283 replaced the almost century-old "percentage of gross revenue" compensation system with an "access line fee" methodology under which cities converted their total 1998 CTP franchise fee revenue to access line fees.[79] Under the law, access line fees are *proxies* for the former percent of gross revenue franchise fee.[80] Further, the definition of and categories of access lines are not static:

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[76] Chapter 283. §§ 283.051 (a), 283.056 (a) (1), (2) and (f) provide that the access line fee is the sole compensation to cities for use of the rights-of-way, with no separate local permit fees.

[77] *See* discussion in footnote 50, *supra*, on what constitutes a Chapter 283 "CTP", post-2005, due to 2005 amendments to Chapter 283.

[78] Chapter 283 also precipitated settlements of pending lawsuits between cities and telecom providers concerning disputes over the interpretation of "gross revenue" compensation under city franchises.

[79] This basic transition formula was used for all Texas cities except for a defined group of seven "litigating" cities. Chapter 283, § 283.053(d) allowed a different base amount formula for these seven "litigating" cities, conditioned on the city's dismissal of franchise fee litigation and waiving any claims for past franchise fees.

[80] *Rulemaking Relating To Outstanding HB 1777 Implementation Issues, Commission Order Adopting Amendments to § 26.465*, P.U.C. No. 22909 (September 24, 2001), at 22 "the fee-per-access line compensation methodology established under HB 1777 and the total fees paid to a municipality thereunder are a *proxy* for the compensation formerly received by the municipality under the franchise regime in place prior to the enactment of HB 1777 . . . a municipality's total 1998 franchise revenues from multiple sources, such as fees or in-kind services, were consolidated into one pot and then redistributed over access lines under the HB 1777 compensation methodology . . ."

> …*by rule [the PUC] may modify* the definition of "access line" and *the categories of access lines as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation … as applicable to the municipalities.*[81]

As also discussed above, in 2005, the Texas legislature adopted Chapter 66, which established state-issued cable franchises. Both Federal Cable Law and the 2005 state law are relevant to rights of way use rental compensation. Federal Cable Law permits a cable franchise fee of five percent of the cable operators' gross revenues.[82] The Texas statute adopted that amount as the standardized Texas cable/video franchise fee statewide, with the frequently contentious term of "gross revenue" being expressly, and broadly, defined.[83] In addition to the franchise fee, Federal Cable Law allows cities to require in a cable franchise "adequate" financial support for Public, Educational, and Governmental ("PEG") access channels.[84] Similarly, the Texas statute has standardized a Texas PEG fee statewide as either a local per subscriber fee or a one percent PEG fee.[85]

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[81] Chapter 283, § 283.003 (b). (Italics added). A PUC access line modification review is required at least once every three years. Chapter 283 § 283.003 (c). In a 2003 access line modification review the PUC deleted the requirement for a "circuit" switch. *PUC Order Adopting Amendments to § 26.465*, P.U.C. No. 26412, (February 13, 2003) "By eliminating the requirement that a switched access line must be circuit-based, the commission *lifts the restrictions on technology used in switching*, thus *allowing for the recognition of existing and future technologies*, such as packet switches.", at 12; "*The technology used by the CTP to offer the packet-switched line is irrelevant to its designation as an access line… functionality, rather than technology, is the threshold*...", at 15. (Italics added).

[82] 47 U.S.C. § 542(b). *City of Dallas v. FCC*, 118 Fed. 3d. 393, 398 (5th Cir. 1997). "[G]ross revenue normally includes all revenue collected from any source."

[83] Chapter 66. § 66.005(a) (franchise fee is 5% of "gross revenue"); Chapter 66. § 66.002 (6) (defining "gross revenue").

[84] 47 U.S.C. § 531 (general PEG requirements) and 47 U.S.C. § 541 (a) (4) (B) (a franchise authority may require adequate financial support for PEG facilities).

[85] Chapter 66. § 66.006(a) and (b).

3. In Texas, wireline broadband service providers do not pay a separate local rights of way charge to provide broadband services, so there is no "barrier".

Because the NOI concerns potential local barriers to broadband deployment, Coalition Comments address whether compensation charged for use of local rights of way to provide broadband services may be a "barrier" in Texas. It is not. No such "barrier" exists in Texas because there are no separate charges for use of the public rights of way in providing wireline broadband services.[86] The PUC determined over ten years ago that broadband over telephone

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[86] Texas cities have long taken the position they can charge a separate rights of way rental charge for use of the rights of way to provide broadband services, a position not abandoned in these Comments. The issue of whether a separate local rights of way franchise is required to provide a particular service depends on the extent and purpose of the existing statutory or franchise grants of access. Chapter 283 grants the right to use the rights of way to provide "telecommunication services. Chapter 66 grants the right to use the rights of way to provide "cable" or "video" services. Neither grants the authority to provide broadband Internet access service using public rights of way. To use the rights-of-way in providing a different service may require separate city authority. *See General Tel. Co. v. FCC*, 449 F.2d 846, 855, 860 (5th Cir. 1971) providing cable television services was not incidental to providing telephone services. *See also City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999), holding that an "Open Video System" provider [OVS was created as part of the 1996 FTA in 47 U.S.C. § 573 as an alternative to traditional cable] could be required to have a local franchise; *see also, Marcus Cable Associates, L.P., d/b/a Charter Communications, Inc v. Krohn, 90 S.W.3d 697, 704-705(Tex. 2002)* rejected a cable provider's use of a private electrical transmission easement under a 1983 state cable television access statute; *but see, City of Austin v. Southwestern Bell Video*, 193 F.3d 309 (5th Cir. 1999), holding that "video" service provided by an affiliate of the underlying carrier under a tariff of that same underlying carrier was not a "cable service" provided by the underlying carrier requiring a separate local franchise.

While several cities have litigated this issue, including a Texas city, those cases have thus far precluded any separate rights of way charge for cable modem/broadband services. *City of Chicago v. Comcast Cable Holdings,* L.L.C.900 N.E.2d 262, (Ill. 2008). Chicago's cable franchise contract was preempted by federal law, citing the FCC's *2002 Cable Modem Declaratory Ruling* that "revenue from cable modem service would not be included in the calculation of [cable service] gross revenues from which the franchise fee ceiling is determined" citing 47 U.S. C. § 542 and the 5% franchise fee "cap". *Comcast Cable of Plano, Inc., v. City of Plano*, 315 S.W.3d 673 (Tex. 5th App. Dist.-Dallas, 2010). Held that federal preemption barred the franchise fee on cable modem service as a contract claim, but remanded on other claims, such as breach of implied contract, quantum meruit, unjust enrichment, and trespass. No Texas city is currently charging a fee to broadband providers, nor is there any pending litigation in Texas on this matter.

lines, e.g., DSL, is not an "access line" for purposes of access line fees under Chapter 283, therefore "access line" fee rights of way charges do not apply to DSL/broadband service.[87] Similarly, cable service providers have not paid any cable service franchise fee on cable modem service revenue since 2002, when the FCC declared that "cable modem service" was not a "cable service," but rather an interstate "information service".[88] In addition, since 2005 municipal broadband over power lines ("BPL") rights of way charges may not exceed what a city charges other broadband providers, such as DSL and cable modem service providers.[89] Because neither DSL broadband service providers nor cable modem broadband service providers pay a rights of way fee in Texas, there can be no local municipal fee on BPL providers in Texas.

C. Texas Rights of Way Access and Use: Statutory PUC Applications, and Rights of Way Management Ordinances.

1. Texas rights of way access: One simple application to PUC.

Only one PUC application is necessary for telecommunications and cable or video providers to be authorized to use local rights of way in Texas pursuant to Chapter 283 and

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[87] *Implementation of H.B. 1777*, Project No. 20935, Commission Order Adopting Rule § 26.465, at 33-36 (adopted December 17, 1999; filed December 20, 1999). *See also Commission Order Approving Amendments to P.U.C. Subst. Rule § 26.465*, Project Number 26412, at 15-16 (Approved Feb. 13, 2003).

[88] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C. Rcd. 4798, 4802-4803 [¶¶ 7, 33-59] (Mar. 15, 2002) ("*2002 Cable Modem Declaratory Ruling*"), *aff'd sub nom. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2702-10 (2005) ("*Brand X*"). This analysis may have to be revised in light of the FCC's "Third-Way" proceeding to reconsider its characterization of Internet broadband services an "information service" to also have a separate component that is a "telecommunications service". *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, GN Docket No. 10-127, FCC 10-114 (June 17, 2010).

[89] Tex. Util. Code, § 43.101 (e). (Acts 2005, 79th Leg., 2nd C.S., ch. 2, Sec. 2, eff. Sept. 7, 2005).

Chapter 66, respectively.[90] Both statutes grant this right of access without a local franchise, while preserving a city's rights of way management police powers. The application process to the PUC under each statute varies, with the PUC certificating over 500 telecommunication providers since 1995,[91] and granting sixty-three cable and video services franchise certificates since 2005.[92]

The City of Arlington, Texas, Comments, which detail their rights of way management ordinance, and specific provisions, are adopted by reference.

2. Texas rights of way management ordinances: updated, similar, competitively neutral and non-discriminatory.

Texas statutory law directly authorizes access to local rights of way for most wireline providers. (Few local franchises remain for either telecommunication or cable providers.) As a historical matter, local city franchises had three main provisions:

- A grant to use the public rights of way;
- The compensation to use the public rights of way; and
- The rights of way management terms and conditions for use.

Both the 1999 Texas Telecommunications Access to Local Rights of Way Statute and the 2005 Texas Cable Franchising Statute addressed, from a state level, the first two of those provisions. They directly granted access to local rights of way[93] and set the compensation for use of the rights of way.[94] The third provision, the rights of way management terms and conditions

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[90] Chapter 283, §283.052 (telecommunications providers). Chapter 66, § 66.003. (cable or video providers).

[91] *See* footnote 52, s*upra*.

[92] *See* footnote 67, s*upra*.

[93] Chapter 283. § 283.052 and Chapter 66. § 66.003 (c) (2), respectively.

[94] Chapter 283. § 283.051 and Chapter 66. § 66.003 (c) (2), respectively.

needed to be addressed at the local level, because Chapter 283 allowed all local telecommunication franchises to be terminated,[95] and, as of September 1, 2011, Chapter 66 allows all but four local cable franchises to be terminated.[96] Both statutes preserved cities' police-powers to manage local public rights of way.[97] This allowed local replacement ordinances for those rights of way management terms and conditions that were in the terminated franchises.

Exercising their retained police-powers, and to supply the missing rights of way management terms after the termination of local franchises, Texas cities began to enact individual rights of way management ordinances in 1999. After adoption of the 2005 Texas Cable Franchising Statute, cities updated their rights of way management ordinances to specifically include cable providers that now operated under a PUC-issued cable franchise. The key terms the ordinances are substantially similar among cities, and are competitively neutral and non-discriminatory between providers. The ordinances were enacted to ensure minimum construction and other standards in the absence of a local franchise. Links to representative examples of those rights of way management and permitting ordinances appear below for: Larger cities (Houston and Dallas), a mid-size city (Austin), a smaller suburban city (Round Rock), and a rural city (Wharton):

- **Austin:** Chapter 14-11. Use of Rights of Way, and Chap. 15-8. Use of Rights of Way by Telecommunication Providers.[98]
- **Dallas:** Chap. 43, Streets and Sidewalks, Art. VIII. Certain Use of the Public Rights-of-Ways.[99]

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[95] Chapter 283. § 283.054.

[96] Chapter 66. § 66.004, as amended in 2011. *See* footnote 64, *supra*.

[97] Chapter 283. § 283.056 (c) and Chapter 66. § 66.011 (a), respectively.

[98] http://www.amlegal.com/austin_tx/.

[99] http://www.amlegal.com/dallas_tx/.

- **Houston**: Chap. 40, Streets and Sidewalks, Art. V. Excavations in Rights of Ways and Art. XIV. Rights of Telecommunication Providers to Use Rights of Ways.[100]
- **Round Rock**: Chap. 44, Utilities, Art. XI. Public Rights of Way Management.[101]
- **Wharton**: Chap. 70, Streets, Sidewalks and public Ways, Art.III, Construction in and Use of Public Rights of Way.[102]

3. Detail in rights of way management ordinances results in clarity—and length -- a virtue, not a sin.

Just as technical FCC regulations are detailed and lengthy, so are local rights of way management ordinances. Detailed ordinances provide exact guidance to all users of the rights of way - both inexperienced and experienced. They necessarily contain guidance on an array of matters, including among others: (1) where to apply for a permit; (2) how long a permit is valid; (3) when is a permit needed, i.e., what constitutes an "excavation" for which a permit is required and what constitutes "routine maintenance," which typically requires no permit; (4) what types of maps are required for underground facilities, pre- and post-construction; (5) what details those maps need; (6) types of prior notice to adjacent land owners and other underground utilities owners; (7) flagman and signage required at construction sites; and (8) depth of certain underground utilities (e.g. gas).

These details frequently result in a lengthy rights of way management ordinance. It is not without some irony that some providers complain, typically as part of what can only be called a "throw-down" laundry list of hypothetical local "barriers", about the "length" of those

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[100] http://library.municode.com/index.aspx?clientID=10123&stateID=43&statename=Texas.

[101] http://library.municode.com/index.aspx?clientId=14610&stateId=43&stateName=Texas.

[102] http://library.municode.com/index.aspx?clientID=11706&stateID=43&statename=Texas.

ordinances. Seldom, however, do they complain about specific details. This type of complaint is particularly frustrating and perplexing because much of the detail in those ordinances was specifically requested by the providers to ensure that the ordinance would not only provide absolute clarity regarding requirements in the permitting and construction process, but also prevent ambiguity that might allow "unbridled" local discretion, a fate all providers sought to avoid. The FCC should be wary of the "it's too long and complicated" criticism of rights of way management ordinances.

D. For over a century Texas cities negotiated thousands of reasonable rights of way use agreements, long before the 1999 and 2005 Texas statutory changes.

As discussed in these Comments, from 1858 until 1999, Texas cities (there are over a thousand) were the franchising authority for telecommunication providers, with the same being true until 2005 for cable providers. During that almost 150-year period, when cities were the sole franchising authority, they successfully negotiated literally thousands of initial telecommunications and cable franchises, renewal franchises, amendments, and dozens of additional competitive telecommunications and cable franchises in the larger cities of Texas. These were the result of reasonable, good faith negotiations by all parties. During the almost 19 years following the revision of 47 U.S.C. Sec. 541 (a) (1) in 1992 (which prohibits non-exclusive, second competitive cable franchises from being "unreasonably refused"), no reported legal action has been lodged against a Texas city for unreasonable refusal to grant a second cable franchise.

To assist the FCC in evaluating the ease of accessibility to Texas local public rights of way before the legislative changes in 1999 and 2005, a few examples of city negotiated franchises will be discussed. As the FCC referred to a cable franchise Verizon negotiated with the City of Keller, Texas, a discussion of that Keller-Verizon cable franchise negotiation is a

good beginning to a discussion of the cable franchising process in Texas before the 2005 statutory change.[103] As a principal provider of broadband, Verizon successfully negotiated several competitive cable franchises in Texas prior to the adoption of the 2005 Texas Cable Franchising Statute.[104] While Verizon complained about the lengthy negotiations in its comments filed at the FCC[105], it did not mention that the primary reason for the delay was Verizon's absolute refusal to accept terms that other cable providers had agreed to in the recent past. Within days after Verizon requested a cable franchise, the city presented Verizon with a proposed franchise containing terms substantially similar in their totality to the incumbent's franchise agreement, and which could be agreed to immediately by the city. Verizon, however, refused to accept those terms, and others. Verizon's unreasonable bargaining posture directly resulted in the protracted negotiation process.

One of the principal causes for the protracted negotiations on the franchise was Verizon's refusal to extend and build-out its system to provide cable service to the remaining 20 percent of the city it did not serve in its existing telephone facility footprint as a telephone provider, despite the express provisions of federal law.[106] Keller's proposal was for Verizon to serve the remaining

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[103] *2005 Cable Franchising NPRM,* n.35, and *In the Matter of implementation of Section 621(a) (1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992,* MB Docket No. 05-311, *Further Notice of Proposed Rulemaking,* 22 FCC Rcd. 5101, n.135 (March 5, 2007) ("*2007 1st Cable Franchising Order and Further NPRM*."). The City of Keller is primarily residential, with a growing population over 30,000, located between Ft. Worth and Dallas.

[104] Verizon Comments, at 5 on the reference to Texas franchises. The Verizon Comments were referred to several times in the *2005 Cable Franchising NPRM*, ¶ ¶ 5, 8 and n.13.

[105] *2005 Cable Franchising NPRM*, ¶ 5.

[106] 47 U.S.C. § 541(a) (4) (A). Even after this franchise was negotiated the FCC "tentatively conclude[d]" that it was not "unreasonable" for a city to require city wide "build-out", as Keller had attempted. The FCC sought comments. *2005 Cable Franchising NPRM*, ¶ 20. Two years after those comments the FCC stated "build-out" requirements for new competitive entrants can be "unreasonable". *2007 1st Cable Franchising Order and Further NPRM*, ¶¶ 40, 82, and 89.

20 percent of the city in a flexible "crawl-out" process, to be completed over an extended period of time. This "crawl-out" process was wholly dependent on customer demand, from customers near Verizon's existing facilities. Verizon would be required to build-out beyond its existing telephone footprint in the city but only if a minimum number of customers requested service, and only if the requesting customers were within a short distance from existing Verizon facilities. *Verizon rejected even the* "crawl-out" *proposal*, refusing to provide cable service even a block outside of its telephone footprint no matter the adjacent customer demand or time frame allowed.[107] Verizon's intransigence forced on Keller the Hobson's choice to either entirely deny all of its citizens competitive cable service or to discriminate against constituents in the areas of the city Verizon refused to serve by accepting Verizon's "take-it-or-leave-it" terms. *Keller relented and compromised. Keller accepted Verizon's demand to limit its cable service area to obtain a competitive provider for at least a portion of its citizens, despite the pending threat of a legal challenge by the incumbent cable provider*.

The indemnity provision, a standard but significant franchise provision, and a provision typically agreed to without a problem, also caused delay in the negotiations. Keller immediately recognized the risk of potential litigation should it award a cable franchise to Verizon on terms more favorable than another cable provider's franchise, as Verizon was demanding. Indeed, the incumbent cable providers had already asserted that such a franchise would be unlawful as unequal treatment to a similarly situated provider that could give rise to litigation or a request for modification of the incumbent's cable franchise pursuant to 47 U.S.C. § 545.[108] To protect itself

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[107] *2007 1st Cable Franchising Order and Further NPRM*, n.135.

[108] Such a modification under federal law may have also precipitated litigation. In other Texas cities, the incumbent argued that if the new Verizon franchise was not "substantially similar" to the incumbents franchise, then the city, in granting it, would violate a "level playing field" provisions in the incumbent's franchise.

from the risks of potential litigation cost were it to grant the franchise on Verizon's terms, Keller (and later other cities) included in the proposed indemnification provision a requirement that Verizon would indemnify the city for any litigation cost should the franchise be challenged as discriminatory. Keller's position balanced Verizon's demand to enter the market on terms that discriminated in Verizon's favor in comparison to other pre-existing cable franchises in the city with the city's attendant risk of litigation. Verizon again rejected the City's proposal to indemnify Keller in this manner. *Keller compromised,* and accepted that there would be no reimbursement or indemnification of any city litigation cost, but proposed as an alternative that Verizon agree to intervene in any suit challenging the franchise within the upcoming year to ensure that Verizon would bear the burden of defending the franchise it had demanded. On the indemnity provision alone, Verizon bears a significant responsibility for the protracted negotiations.

Only Keller's ingenuity and tenacity brought competitive cable service to the community.[109] In spite of Verizon's unreasonableness, Keller granted a franchise to Verizon in a matter of months of actual negotiating time. And despite the protracted delays due to Verizon's intransigence on key terms, there was no delay in deployment of Verizon's cable services. Verizon completed its fiber build-out and video testing at the same time the franchise was granted, all within the process prescribed for a local cable franchise under Federal Cable Law. Verizon remains a competitive cable provider in Keller under its locally granted franchise. Of course another result of Verizon's refusal to serve the entire city is the more limited competitive

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[109] Verizon also refused to agree to other common cable franchise requirements, such as: as an alternative to automatic termination for non-compliance there would be liquidated damages; that appeals from a franchise termination were "as allowed by law". Verizon demanded that appeals were to be *de novo*, to preclude any legislative presumptions that may be "allowed by law", not unlike the usual presumption of legitimacy of a FCC order on appeal.

broadband deployment available in the city. The 20 percent of the city *left unserved was by the company's choice*, and not due to any local barriers to broadband deployment - a fact the FCC should take into due consideration as it considers "solutions" on how to accelerate broadband deployment.

Unfortunately Keller's experience is not isolated. Other non-municipal voices have noted that delays in negotiated rights of way use agreements are caused by the intransigence and unreasonableness of competitive providers. In its comments to the *2005 Cable Franchising NPRM*, Cablevision spoke extensively on these matters--complimenting local franchising authorities on granting franchises in a reasonable, timely manner and castigating incumbent telephone companies for obstructing franchise negotiations by their own conduct. Sections of those Comments are entitled as follows, with copious details provided under each section:

- "States and Localities Already Promote Competitive Franchising."[110]
- "Any Problems or Delay from Cable Franchising Experienced by Verizon and AT&T Are Largely of Their Own Making."[111]
- "The Evidence Suggests that it is Verizon, and not Local Governments, That is Unwilling to Abide by Reasonable Franchise Terms."[112]

Second competitive cable franchises are not unusual in larger urban communities across Texas, such as Austin, Dallas, and Houston. Historically the typical competitive cable franchise was granted within a matter of months of after a completed application in those cities. Additional

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[110] Comments of Cablevision Systems Corporation, page 9, filed Feb. 13, 2006, in *2005 Cable Franchising NPRM* ("Cablevision Comments"). *See also 2007 1st Cable Franchising Order and Further NPRM*, ¶¶ 25-27 which summarizes the comments of other cable providers that the new entrants have not negotiated with cities in a reasonable manner.

[111] Cablevision Comments, at 12.

[112] *Id.* at 14.

competitive franchises typically contain provisions substantially similar to the incumbent cable provider's franchise. Most delays in *competitive franchise* negotiations are due to the competitive provider being resistant to those terms, particularly city-wide build-out, even over extended periods of time with a "crawl-out" process. When agreeable, the franchises can be negotiated in a brief period and many were concluded successfully in the recent past when all parties participated reasonably.

For example, the City of Austin (population 650,000 plus) quickly negotiated several additional competitive franchises over a matter of months in early 2000, such as one with Grande Communications. Grande applied for a cable franchise in February 2000 and by March 2000, the proposed franchise was presented on the city council agenda for the first of three required City Charter readings. Final approval was granted the next month. Grande commenced service and still operates in Austin today, albeit under a new PUC-issued cable franchise.

The City of Houston (population two million plus) has granted a number of non-exclusive cable franchises since the 1980's. Phonoscope Communications began operations in Houston as an alternative provider during the 1950s serving large commercial operations, such as the Texas Medical Center, NASA, and multi-family dwellings; its initial cable franchise was granted in 1986.[113] Several other competitive cable providers held cable franchises in Houston, years before the 2005 state franchising law, among them, TVMAX, Northland Cable, and Cebridge continue to provide cable service in Houston.[114] Time Warner Cable, the incumbent

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[113] Phonoscope, Houston Ordinance No. 86-1500.

[114] TVMAX, Houston Ordinance No. 89-338; Northland Cable, Houston Ordinance No. 2002-1083. Predecessor in interest to Cebridge and Cebridge, Houston Ordinance No. 98-15, Cebridge, Houston Ordinance No. 2002-458, and Houston Ordinance No. 2003-691.

cable provider, negotiated a several franchises and renewal franchises over decades ago, later being transferred to Comcast.[115] Comcast is now operating under a PUC issued cable franchise.

The Coalition suggests that the evidence to date is that Texas cities have developed a record of cooperative, expeditious good faith negotiations to bring competitive providers into the local marketplace. This municipal effort has resulted in significantly higher broadband deployment in the urban areas of Texas, as documented in the two Texas broadband studies.

III. COMMENTS ON THE FCC'S LIMITED OR LACK OF JURISDICTION CONCERNING LOCAL RIGHTS OF WAY REGULATIONS AND COMPENSATION

The NOI proposes a series of FCC "solutions" to the non-problem of local "barriers" to broadband deployment.[116] The NOI *then* inquires whether the FCC's legal authority, its jurisdiction, extends to each of the proposed solutions.[117] The Coalition Comments will reverse that sequence, first addressing the limits on the FCC's legal authority for the various "solutions", followed by substantive comments on the NOI proposed "solutions" in the context of the FCC's legal authority. The Coalition adopts by reference the Comments filed by NLC, *et al*. on the issues of the FCC's jurisdiction.

A. Limited FCC Statutory Authority to Preempt Local Regulations.

Several of the FCC commissioners released separate written statements with the NOI concluding that the FCC's jurisdiction in this area is limited. The statements encouraged a

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[115] Houston Ordinance 98-1044 documents the prior franchises and the assignment of the cable franchise agreements to a newly formed umbrella entity for Time Warner, Texas Cable Partners.

[116] NOI ¶¶ 39-50.

[117] NOI ¶¶ 51-58.

collaborative relationship between the FCC local governments. In pertinent part, the commissioners stated:

- FCC should "*be cognizant of the authority that local, state and Tribal entities have over rights-of-way…[and]* to *be mindful of not impinging on local rights"*[118]
- "*FCC should be mindful of its limitations and only use this information in areas where it has jurisdiction"*[119]
- FCC "*authority to act in this area is limited*"[120]
- FCC must "commit ourselves, to *work in partnership, with our counterparts in state and local governments*…"[121]

The Coalition agrees with the commissioner's quoted statements in contrast to the NOI.

1. The NOI does not recognize that the FCC has limited rulemaking and preemptive jurisdiction under section 253 (d).

The NOI incorrectly concludes that the FCC "has broad general rulemaking authority that would allow it to issue rules interpreting sections 253…."[122] To reach this conclusion, the NOI quotes relevant portions of subsections (a), (b), and (c) of section 253, but only summarizes subsection (d), notwithstanding that subsection (d) is the very subsection that grants to the FCC whatever preemptive authority it holds in this area.[123] The NOI mischaracterizes subsection (d) to mean: "[it] requires the Commission to preempt state or local government action in certain situations." ("Certain situations"?) This imaginary, general mandate fails on all fronts.

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[118] Commissioner Michael J. Copps. (Italics added).

[119] Commissioner Robert M. McDowell. (Italics added).

[120] Commissioner Meredith Attwell Baker. (Italics added).

[121] Commissioner Mignon L. Clyburn. (Italics added).

[122] NOI ¶ 57.

[123] NOI ¶ 54.

Fortunately, the actual text in subsection (d) was not written as vaguely as the NOI reads it. Congress did not leave one of the FCC's most significant powers, the power to preempt local laws across the country, to apply in undefined "certain situations" for the FCC to decide. The text of subsection (d) provides clear guidance on specific "certain situations" when the FCC has the power to preempt and override local laws:

> *If*, after notice and an opportunity for public comment, *the Commission determines that a* State or *local government* has permitted or imposed any statute, regulation, or legal requirement that *violates subsection (a) or (b) of this section, the Commission shall preempt …..*[124]

By its express language, subsection (d) limits the FCC's preemptive authority to violations *only* of subsections (a) and (b) of Section 253. Conspicuously omitted from the FCC's preemptive authority granted in subsection (d) is subsection (c), involving local rights of way management and compensation matters. As discussed in detail *infra*, the FCC is granted no preemptive or rulemaking authority jurisdiction as to subsection 253 (c) rights of way disputes.

The NOI also cites three other provisions on the FCC's general statutory authority for rulemakings:[125]

- Section 201(b) "Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.";
- Section 303(r) "*[e]xcept as otherwise provided in this Act*, the Commission from time to time, as public convenience, interest, or necessity requires shall-- . . . make such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law*, as may be necessary to carry out the provisions of this Act."[Italics added]; and

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[124] 47 U.S. C. § 253 (d) (Italics added).

[125] NOI ¶ 57.

- Section 4(i), the commission's "ancillary" authority to "make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."[126]

None of the cited sections grants the FCC broad, open-ended rulemaking authority, beyond the narrowly restricted authority granted in subsection 253 (d).[127] The FCC asserts that its authority under Section 201(b) is triggered in "the absence of a specific delegation", because such authority has been upheld in the context of cable regulation.[128] That assertion fails because subsection 253 (d) does not function as "the absence of a specific delegation of authority"; rather, it signifies the specific denial of authority by excluding a specific subsection from FCC jurisdiction while other subsections were included. Section 303(r) is limited by its very terms to "*[e]xcept as otherwise provided in this Act*" and to apply "*not inconsistent with law*". Section 253 (d) is "*as otherwise provided in this Act*" and to override it is "*inconsistent with law*". These two sections for general rulemaking authority, Section 201(b) and Section 303(r), can neither control nor override the express omission (e.g., denial of authority) in subsection 253 (d) regarding subsection 253 (c) disputes.

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[126] 47 U.S.C. § 154(i). *Comcast Corp. v., FCC*, 600 F.3d 642, 646 (D.C. Cir. April 6, 2010). ("*Comcast*") "Courts have come to call the Commission's section 4(i) power its 'ancillary' authority." And at 651, "The Commission's exercise of [it's] ancillary authority … must…'be independently justified.'"

[127] *See*, *City of Dallas v. FCC*, 165 F.3d 341, 347-48 (5th Cir. 1999) "The FCC's broad reading of preemptive authority also conflicts with Supreme Court precedent. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court held that if Congress intends to preempt a power traditionally exercised by a state or local government, 'it must make its intention to do so `unmistakably [Page 348] clear in the language of the statute.' *Id.* at 460…" Held that FCC rules could not preempt a city required local franchise to use the rights of ways to provide OVS service, a form of cable services newly authorized by the 1996 FTA.

[128] NOI, at n.58, citing *Alliance for Community Media*, 529 F.3d 763, 772-76 (6th Cir. 2008), cert. denied, 129 S. Ct. 2821 (2009).

Further Section 4(i), the FCC's "ancillary" authority, provides even less support for broad rulemaking authority, as Section 4(i) is limited in its application, as stated by the Federal D.C. Circuit Court's recent focused review of that particular section in *Comcast*.

> The teaching of *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II* - that policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority-derives from the "axiomatic" principle that '*administrative agencies may [act] only pursuant to authority delegated to them by Congress*.' [Citations omitted] … Policy statements are just that-statements of policy. They are not delegations of regulatory authority…. Although policy statements may illuminate that authority, it is Title II, III, or VI to which the authority must ultimately be ancillary. [Citation omitted][129]

Section 4(i) provides no authority for the FCC to preempt local regulations or to set rights of way compensation rates. In this instance, the FCC's ancillary authority finds no independent basis that extends subsection (d) to subsection (c). The FCC's preemptive jurisdictional grant in subsection (d) is clearly limited to subsections (a) and (b). Any FCC ancillary authority attributable to subsection (d) is only undermined by the exclusion of subsection (c) in subsection (d).

> It is true that "Congress gave the [Commission] broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies." ….. It is also true that "[t]he Internet is such a technology," … "arguably the most important innovation in communications in a generation," …. Yet notwithstanding the "difficult regulatory problem of rapid technological change" posed by the communications industry," the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer ... Commission authority.[130]

In this area, where the FCC has limited rulemaking and preemptive authority to interpret alleged violations of section 253 (a), only clear evidence that local legal requirements "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate

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[129] *Comcast*, at 654. (Italics added).

[130] *Comcast*, at 661. (Citations omitted, italics added).

telecommunications service" would trigger the authority for the FCC to act. The FCC itself set this high bar set in 1997.[131]

> With respect to a particular ordinance or other legal requirement, it is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement … must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).[132]

Several circuit courts have restated, and to some degree refined, the FCC's standard to prove a section 253 (a) violation. The Courts have required a plaintiff to show "actual or effective prohibition, rather than the mere possibility of prohibition…..but …an existing material interference with ability to compete…"[133] This standard is the touchstone of any FCC rulemaking authority, however limited, interpreting section 253 (a) alleged violations.

2. FCC is precluded by statute from adjudicating rights of way disputes under Section 253 (c).

The FCC has no authority to adjudicate section 253 (c) rights of way disputes. While the FCC acknowledges these issues are currently being vigorously contested, and are still pending in

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[131] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park California Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd 14191 (1997). No preemption under § 253 (d) as there was no violation of § 253 (a) proven (*"California Payphone");* and *TCI Cablevision of Oakland County, Inc*., 12 FCC Rcd 21396, 21399 (1997) FCC declined to issue ruling as to whether there should be preemption under § 253 (d).

[132] *TCI Cablevision of Oakland County, Inc*., 12 FCC Rcd 21396, 21440 (1997).

[133] *Level 3 Comme'ns v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007), and *Sprint Telephony v. County of San Diego*, 543 F.3d 571, at 578 (9th Cir. 2008), with both *Level 3 and Sprint* citing the FCC, *California Payphone*. Both courts also discuss other circuit courts differing interpretations of what constitutes a violation of § 253 (a).

an unresolved dispute, it inquires in this NOI if it has the authority to adjudicate section 253 (c) rights of way disputes.[134] The clear answer is it does not.

The NOI suggests that the reason for continued legal arguments over whether the FCC has authority to adjudicate rights of way disputes "stems in large part from the language and legislative history of subsection 253 (d)."[135] However, when the Eleventh Circuit reviewed the same legislative history and the language in subsection (d) before and after it was amended by Congress to its current text, it concluded:

> it is clear that subsection (d), despite its less-than-clear language, serves a single purpose-it *establishes different forums based on the subject matter of the challenged statute or ordinanc*e. … we hold that *a private cause of action in federal district court exists under § 253* to seek preemption of a .. local … regulation only when that …. regulation purports to address the management of the public rights-of-way, thereby potentially *implicating subsection (c)*. [FN 14 omitted] All *other challenges brought under § 253 must be addressed to the FCC*.[136]

The final language in subsection (d) was intentionally revised by Congress from its previous version to narrow the scope of the FCC's preemptive jurisdiction. It now applies only to violations under subsection (a) or (b). Congress omitted from subsection (d), subsection (c), on rights of way management or compensation disputes.

The "initial" subsection (d) was amended into its final, adopted version by striking two words: "this section." In other words, *the unamended subsection (d) would have included all subsections of 253-- (a), (b) and (c) -- but the final version replaced those two stricken words of*

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[134] NOI ¶ 58, citing in n.62, Opposition of NYSTA, at 14-19 (October 15, 2009) and in n.64, *Level 3 Preemption Petition*, at 28-30.

[135] NOI ¶ 58, and *see also* n.63.

[136] *BellSouth Telecomm. Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1191 (11th Cir. 2001) ("*BellSouth*"). (Italics added).

"this section" with "subsection (a) or (b)". For absolute clarity in showing these final revisions in that amendment, below is a mark-up of subsection (d) from "[i]n its initial form".[137]

> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with subsection (a) or (b) ~~this section~~, the Commission shall ~~immediately~~ preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[138]

As Senator Gorton, the author of the amendment, stated at the time:

> …the *rules that a city … imposes on how its street rights of way are going to be utilized*, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, *are a matter of primarily local concern* and, of course, they are *exempted by subsection (c)* of this section *... in the case of these purely local matters dealing with rights of way, there will not be a jurisdiction* [sic] [1191] *on the part of the FCC* immediately to enjoin those local ordinances. [The Gorton amendment] *retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts…The appropriate balance is to leave purely local concerns to local entities...*[139]

Congress could not have been clearer. However, to avoid an overly broad reading of any provision in the 1996 FTA regarding state and local authority, Congress included Section 601(c) in the 1996 FTA.[140] Section 601(c) sets the framework for construing the breadth and extent of FCC authority under section 253 (d). Section 601(c) provides:

> (c) FEDERAL, STATE AND LOCAL LAW.-
>
> (1) NO IMPLIED EFFECT.- This Act [1996 FTA] and the amendments made by this Act *shall not be construed to modify, impair, or supersede*

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[137] *BellSouth*, at 1190. "Senate Bill 652 in the 104th Congress. In its initial form, subsection (d) read…"

[138] Stricken words and underlying were added for emphasis.

[139] *BellSouth*, at 1190-1191. *See also*, *Qwest Corp. v. City of Santa Fe, N.M.*, 380 F.3d 1258, 1265-66 (10th Cir. 2004).

[140] Pub. L. 104-104, Title VI, sec. 601, Feb. 8, 1996, 110 Stat. 143.

> Federal, State or *local law unless expressly so provided in such Act or amendments*. [Italics added].

Because section 253 (d) did not include subsection (c) in the grant of FCC enforcement jurisdiction the FCC may not by implication assert such jurisdiction to review or preempt in subsection (c) disputes. The Congressional legislative record is clear, at one time subsection (c) was in subsection (d), but Congress later excluded it. The FCC has no role in any alleged section 253 (c) violation. Disputes under section 253 (c) are to be adjudicated by the local courts, as Congress intended, as the 1996 FTA provided and as the *BellSouth* court stated.[141]

The NOI's further suggests that -- to the extent section 253 language is ambiguous -- the FCC has even greater latitude because it should not be "bound by …courts' statutory interpretations".[142] But neither subsection (d) nor (c) suffers from such ills of draftsmanship. As revised by Congress to its final text, subsection (d) contains has no ambiguity on this point. It is a model of clarity that narrows the FCC's scope of preemptive authority to subsections (a) and (b) and denies the FCC any authority to review subsection (c) disputes concerning rights of way management and compensation issues by its omission. Where clarity prevails, the agency may not invent ambiguity.

The FCC acknowledges that in the fifteen years since section 253 was enacted, despite numerous opportunities, the FCC "has not taken action to resolve this issue" of its jurisdiction to adjudicate rights of way cases or preemption under section 253 (c).[143] That the FCC has not

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[141] *BellSouth,* at 1191.

[142] NOI ¶ 58. And s*ee* NOI, n.67. The cases cited in this NOI note do not discuss the FCC's jurisdiction under subsection (d) to review section 253 (c) disputes. The discussion was in the context of whether a private right of action existed to bring a claim in *court* under section 253 (c).

[143] NOI ¶ 58, and n.65, citing, *Petition of the State of Minnesota for Declaratory Ruling Regarding the Effect of Section 253 on an Agreement To Install Fiber Optic Wholesale*

asserted any jurisdiction "to resolve this issue" in fifteen years speaks volumes; apparently even the FCC has recognized since 1996 that it lacks adjudicatory and preemptive jurisdiction to review section 253 (c) disputes.

In a further grasp for ambiguity, the NOI implies that courts have taken "differing approaches" on whether the FCC holds section 253 (c) review jurisdiction.[144] They have not. The courts "differing approaches" have not related to the FCC's jurisdiction under section 253 (c). Rather, the courts have differed on interpretations of what constitutes a violation section 253 *(a)*, which the FCC has jurisdiction under section 253 (d) to review. To a lesser degree, the courts have differed on whether a private cause of action can be taken in *court* to enforce alleged section 253 *(c)* violations.[145] The courts have not differed on interpretations of the FCC's section 253 (d) preemption authority to resolve section 253 (c) issues. As the *BellSouth* Court stated, the FCC is granted no such jurisdiction to adjudicate or to preempt local rights of way regulations or rights of way compensation where section 253 (c) is "potentially implicat[ed]", those section 253 (c) issues are for the courts.[146]

In the past the FCC has asserted broad preemptive authority over local franchise requirements, and when they did the courts have held the FCC has no such broad preemptive

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Transport Capacity in State Freeway Rights of Way, CC Docket No. 98-1, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21730 (1999).

[144] NOI ¶ 58, and NOI n.66, citing *BellSouth,* at 1189.

[145] *BellSouth, at* 1186-87 discussing differing courts interpretations of § 253; at 1187-1191, with its analysis, at 1191, *holding there is a private right of action under § 253 (c), and that § 253 (c) matters are to be litigated in the courts and not at the FCC. See also Sw. Bell Tele. L.P. v City of Houston,* 529 F. 3d 257, 261 (5th Cir. 2008) discussing the split among five federal circuits of appeal on private right of action under § 253 (c) for § 1983 claims, noting the narrowing of those private rights of action after 2002, post-*Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed. 2d 309 (2002), which required that courts "first determine whether Congress *intended to create a federal right*". (Emphasis in original).

[146] *BellSouth,* at 1191.

authority.[147] Section 253 (d) presents an equivalent situation on the lack of FCC preemptive authority to review or adjudicate rights of way management or compensation disputes that are within the purview of section 253 (c).

B. The Takings Clause of the Fifth Amendment to the U.S. Constitution bars Congress (and the FCC) from Setting Local Rights of Way Use Rental Fees without "Just Compensation".

1. Neither Congress nor the FCC has the authority to take local public property, including rights of way, without "just compensation." In Texas, just compensation means value-based compensation.

> ***Even interstate business must pay its way--in this case for its right-of-way ….***
> *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. 252, 259 (1919).

Under the Texas Constitution, private use of the public property cannot be gratuitously granted by a city or the state without value-based compensation.[148] Anti-donative provisions reflect the concept that public property, including public rights of way, is held in trust for the public good rather than for individual enrichment through private use. In Texas, value-based compensation for use of the rights of way has historically been a percentage of gross revenue franchise fee, similar to the five percent of gross revenue cable franchise fee paid by cable providers under federal law since 1984.[149] Value–based street rental fees as a method of compensation for use of the public rights-of-way have been upheld both by the U.S. Supreme

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[147] *See* footnote 127, *supra*, and discussion of *City of Dallas v. FCC*, 165 F.3d 341, 347-48 (5th Cir. 1999).

[148] Tex. Const. art. III, § 52 (a) and Tex. Const. art. XI, § 3. *See* footnote 69, *supra*.

[149] 47 U.S.C. § 542.

Court and by the Texas Supreme Court in the face of challenges that the charges were either "unreasonable" or an unlawful "taxes".[150]

In 1893, the U.S. Supreme Court established the bedrock legal principle that -- even where a federal statute granted to private entities the right to use "post roads" and restricted local governments from denying access to rights-of-way to those entities to provide telegraph services -- Congress cannot appropriate or "give" local public rights-of-way to telecommunications service providers without payment of reasonable compensation for that use.[151] Although the principle has been well-settled for over a century, it bears reexamination in light of the NOI's inquiry whether the FCC can "*define what constitutes fair and reasonable compensation under section 253(c)*".[152] As discussed in detail above, they cannot. But there are also U.S. Constitutional restrictions on the FCC—and Congress---on the setting of these fees, discussed below.

The law in this area arose primarily in the late 1800s and early 1900s through the U.S. Supreme Court's interpretations of federal legislation written to accelerate and enhance the deployment of the (then) nascent telegraph industry.[153] In 1866 Congress granted rights to

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[150] The U.S. Supreme Court in *U.S. Sup. Ct., St. Louis* (1893) and in *U.S. Sup. Ct., St. Louis, reh.* (1893) and the Texas Supreme Court in 1940 in *Fleming I* and *Fleming II*.

[151] *U.S. Sup. Ct., St. Louis* (1893), 100-01.

[152] NOI ¶ 56.

[153] *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 9 (1878). The Supreme Court characterized this new telegraph industry as follows: "The electric telegraph marks an *epoch in the progress of time*. [It has] become one of the *necessities of commerce*. It is *indispensable as a means of inter-communication*, but especially is it so in commercial transactions." (Italics added). Congress had long been a supporter of this "new" technology in communications. In 1843, Congress funded an experimental telegraph line from Washington to Baltimore with the first news by telegraph being sent May 1, 1844 of Henry Clay's presidential nomination by the Whig party. (The better know "first" official message, "What hath God wrought?", was sent May 24, 1844, after the line was completed.) In 1860 Congress authorized and funded the first

telegraph companies to use federal "post roads" (mail routes) for long distant interstate telegraph operations and prohibited states and local governments from interfering with telegraph operations in the Telegraph Post Roads Act of 1866.[154] In is not insignificant that in construing this act narrowly, the courts determined that telegraph companies could only use the "post roads" for long distance, interstate telegraph service; they could not use local roads for a local, "district" telegraph operation.[155]

In *U.S. Sup. Ct. St. Louis* (1893), the U.S. Supreme Court considered the question of whether a city had the right to charge a telegraph company for its use of the local rights of way notwithstanding federal law.[156] The Court held that cities could require telegraph companies to pay reasonable street rental payments for the use of the public streets because the federal statute did not and could not grant an "unrestricted right to appropriate the public property of a State."

> It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 [the federal law in this instance] carries with it the unrestricted right to appropriate the public property of a State. …. ***No one would suppose that***

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transcontinental telegraph line from St. Louis to San Francisco, the "national broadband plan" of its day.

[154] 14 Stat. 221 (1866).

[155] *City of Toledo v. Western Union Tel. Co.*, 107 F. 10, 14-15 (6th Cir. 1901). Telephone companies did not have the same rights as telegraph companies under the 1866 statute. This distinction was primarily based on the low use of local streets by a long distant telegraph operation versus the intensive use of local streets by a local telephone operation. *Richmond v. Southern Bell Tel. & Tel. Co.*, 174 U.S. 761 (1899). Similarly, Texas courts use that same concept of different statutory rights for long distant carriers vs. local users of the rights of way. *City of Brownwood v. Brown Telegraph & Telephone Co.* 157 S.W. 1163, 1165-1166 (Tex. 1913). *Athens Telephone Co. v. City of Athens*, 163 S.W. 371, 373 (Tex.Civ.App.-Dallas Jan 24, 1914, writ refused) A telephone company "conducting a *local telephone business,* [has]… a *different rule* with reference to the *rights of such companies* [as]…made clear …. in the *Brownwood* Case..." *Hooks Tel. v. Town of Leary*, 352 S.W.2d 755, 758 (Tex.Civ.App.-Texarkana 1961, no writ): "A local telephone system is not entitled to the privileges granted long distance telephone companies by Art. 1416 ….telephone companies in Texas fall into two classes, either local or long distance."

[156] 148 U.S. 92 (1893).

> ***a franchise from the Federal government to a corporation . . . to construct interstate . . . lines of . . . communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation.*** . . . [T]he franchise . . . would be . . . subordinate to the right of the individual not to be deprived of his property without just compensation. ***And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State***. . . . It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the State, and construct its depot there, ***without paying the value of the property thus appropriated***. Although the statehouse grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and ***it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State***. ***This rule extends to streets and highways; they are the public property of the State***. …. ***it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation***. …. ***whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public*** [Page 102] for being deprived of the common use of the portion thus appropriated.[157]

The Court continued:

> the occupation by this interstate commerce company of the streets cannot be denied by the city; . . . all . . . [the city] can insist upon is . . . reasonable compensation for the space in the streets thus exclusively appropriated . . .[158]

The Fifth Amendment to the U.S. Constitution has long applied to local public property, as well as private property.

> …when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it…[159]

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[157] *U.S. Sup. Ct., St. Louis* (1893), at 100-02. (Bold italics added).

[158] *Id.* at 105. The vitality of *U.S. Sup. Ct., St. Louis* (1893) opinion was evidenced in 1982 by the U.S. Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp,* 458 U.S. 419, 428 (1982) and more recently by the Federal Fifth Circuit in *City of Dallas v. FCC,* 118 F.3d 393, 398 (5th Cir. 1997) on the issue of cable rights of way franchise fees being "rent" and not a "tax".

> Therefore, it is most reasonable to construe the reference to "private property" in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.[FN 15 omitted] Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees." [160]

Congress cannot allow the use of public rights of way by private entities without value-based compensation. Neither may the FCC constitutionally preempt state law to allow private use of the public rights of way by broadband Internet providers without "just compensation".

2. Unique among the fifty states: Texas retained its public lands in the 1845 Congressional Annexation Resolution.

Texas is different, as all Texans know. Texas occupies a unique legal position regarding potential FCC or Congressional grants of private access rights to local public properties in Texas. The Joint Annexation Resolution of Congress, authorizing the annexation of Texas into the United States in 1845, contained the following provision concerning the state's retention of its public property:

> said republic of ***Texas*** … ***shall*** … ***retain all*** the vacant and unappropriated ***lands*** lying ***within its limits***, …***and the*** residue of said ***lands,*** after discharging said debts and liabilities, ***to be disposed of as said state may direct***…[161]

While one cannot ascertain with any certainty all the implications of Texas' retaining its public lands after annexation into the United States in this context the provision does seem to give the custodians of public property in Texas an additional legal basis for opposing any

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[159] *United States v. Carmack*, 329 U.S. 230, 242 (1946). City land was to be taken for a U.S. Post Office site.

[160] *United States v. 50 Acres of Land*, 469 U.S. 24, 31, 105 S.Ct. 451, 445-46, 83 L.Ed. 2d 376 (1984). "When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property." In this case, it was the property of the City of Duncanville, Texas.

[161] *Joint Annexation Resolution of Congress*, March 1, 1845, 28th Congress, 2nd Session. (Emphasis added).

uncompensated federal "takings" of Texas' public lands.[162] This basis is separate and apart from the case law cited *supra* holding that the U.S. Constitution Fifth Amendment's "takings" clause applies to state and local public lands just the same as it does to private lands. While other states may be in different positions, there are no "federal lands" in Texas for Congress or the FCC to "dispose of" to private entities.

IV. COMMENTS ON THE NOI'S PROPOSED FCC "SOLUTIONS" AND COALITION RECOMMENDATIONS TO THE FCC

A. Prior Efforts by the Parties to Resolve Rights of Way Concerns.

The NOI inquires into prior efforts between the parties (e.g., cities and providers) to resolve rights of way access disputes. There have been serious disputes in the past between cities and telecommunication providers, including litigation in the late 1990s over franchise fee payments.[163] However, since adoption of Chapter 283 in 1999 there have been no court-resolved

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[162] While the issue concerning Texas's retaining of its public "interior" lands has not been litigated with the federal government, there was extensive litigation with the United States concerning Texas' seaward boundary, the so called "tidelands" boundary. Once oil was discovered in the Gulf of Mexico it was important to determine how far out Texas', and other states' boundaries went into the Gulf, as opposed to the Federal Government, to determine which entity could lease the "tidelands" property and receive the oil royalties. While most states had a three mile limit as to their seaward boundaries, Texas claimed, along with a number of other states, a larger area. Texas claimed that in its 1836 Treaty between the Republic of Texas and the Government of Mexico ending Texas's Revolutionary War a seaward boundary of "three leagues" (approximately 10.5 miles) was established. Texas took the position that when it was annexed into the United States in 1845, it was taken with its then existing boundaries, as established in the 1836 Treaty. This issue was resolved by the U.S. Supreme Court in *United States v. Louisiana, Texas, et al* [all the Gulf bordering states], 363 U.S. 1(1960) upholding Texas's claim of the three league seaward boundary based in part on the Annexation Resolution of 1845 and the 1836 Treaty. All other Gulf bordering states have a three mile seaward boundary, except Texas and Florida (for different reasons than Texas). 363 U.S. 1, at 24 and 36-65.

[163] Franchise fee dispute litigation in the late 1990s included a number of Texas cities, among them Arlington, Austin, Dallas, and El Paso, *e.g., AT & T Communications of the Southwest, Inc. v. City of Austin*, Tex., 975 F. Supp. 928 (W.D.Tex. 1997) [*Austin I*]; 40 F.Supp.2d 852 (W.D.Tex. 1998) [*Austin II*]; 235 F.3d 241 (5th Cir. [Tex.] 2000) [*Austin III*]; and *AT & T*

disputes in Texas concerning rights of way access or compensation. From time to time disputes have arisen over interpretation of Chapter 283 PUC rules on access line fees, but the disputes were resolved directly by the parties, through informal PUC staff mediations, or in confidential settlements. There are no reported or pending court (or PUC) cases in Texas concerning disputes of access to local public rights of way or compensation.[164]

B. Comments on the Proposed "Solutions" to Address Local Rights of Way "Barriers".

The FCC's "solutions" are predicated largely on the unsubstantiated, and frequently contradicted, premise that local rights of way regulations are "barriers" to broadband deployment. The Coalition adopts by reference the Comments by NLC, *et al.*, on the NOI's proposed solutions.

1. FCC rulemaking and adjudication concerning broadband deployment and local rights of way regulations.

As discussed *supra*, the FCC has limited jurisdiction to promulgate rules pertaining to its authority under section 253 (d) to review claimed violations of section 253 (a) or (b). It has no jurisdiction to review, adjudicate or preempt matters where section 253 (c) is implicated in

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Communications of the Southwest, Inc. v. City of Dallas, 8 F.Supp.2d 582 (N.D. Tex. 1998). [*Dallas I*]; 242 F.3d 928 [*Dallas IV*]; 249 F.3d 336 (5th Cir. 2001). [*Dallas V*]; *Southwestern Bell Telephone Company v. City of Arlington, Texas* (No. 3:98-CV-0844-X, N. Dist. Tex., Dallas Div, 1998). All of these suits, and several others, were dismissed by the cities in 1999 due to provisions in Chapter 283. Chapter 283, § 283.053 (d).

[164] There is pending litigation in state court over the applicability of state statutes to the cost of relocating existing facilities for city construction projects under local city ordinances. (*Sw. Bell Tele. L.P. v City of Houston*, 529 F. 3d 257 (5th Cir. 2008) affirming there was no private right of action under § 253 (c) for § 1983 claims, holding the city ordinance was not preempted by § 253 (a) as it was protected by the "safe harbor" of § 253 (c) and remanding for a determination under state law.) There is also the pending appeal challenging the 2005 Texas Cable Franchising

disputes concerning rights of way management issues or reasonableness of rights of way use compensation. Those disputes fall within the purview of the courts to resolve, not the FCC.

2. The FCC lacks the statutory authority to set local rights of way use rental fees and both the U.S. and Texas Constitution prohibit any fees less than just compensation as an unlawful taking.

The FCC cannot "define what constitutes fair and reasonable compensation under section 253(c)" [165] because it has no statutory jurisdiction in this area. If the FCC or Congress were to "set" rights of way use rental compensation at less than "just compensation", that action, under the U.S. Constitution, would constitute an unlawful taking, as disused in detail, *supra*.

C. Coalition's Recommendations to the FCC to Accelerate Broadband Deployment

1. The FCC should act on the National Broadband Plan recommendation by promptly appointing a state and local government task force.

In the NBP last year, the FCC itself recommended establishment of a joint of task force with state, Tribal and local policymakers to craft guidelines for rates, terms, and conditions for access to public rights of way.[166] It is time for the FCC to act on its own recommendation by promptly appointing that local task force. In this way, the elusive "best practices" can be focused on and finalized in a common forum to be shared with all local communities in the nation.

2. The FCC should act on the National Broadband Plan recommendation that Congress make clear that local governments can build broadband networks by asking Congress to preempt state laws that restrict municipally provided broadband.

Statute, *TCTA v. Hudson, et al*, No. 10-51113, discussed in footnote 60, *supra*. This suit does not concern rights of way access or compensation.

[165] NOI ¶ 57.

[166] NBP. Recommendation 6.6. *See* NBP, Chap. 6, at 113.

The NBP also recommended that Congress should make clear that Tribal, state, regional and local governments can build broadband networks.[167] The FCC should act now on that NBP recommendation to Congress, by encouraging Congress to preempt state laws that restrict municipally-provided broadband. Where the private sector does not or will not provide broadband, cities should not be barred by law from doing so.

3. FCC should encourage municipalities to use city-wide build-out requirements in a flexible, provider-specific manner.

Just a few years ago, the FCC tentatively concluded that it was not unreasonable for a franchising authority to require city-wide build-out, but it should "allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area" in accordance with 47 U.S.C. § 541(a) (4) (A).[168] The FCC then sought "comment on whether build-out requirements are creating unreasonable barriers to entry for facilities-based providers of telephone and/or broadband services."[169] After comments were filed, the FCC was critical of build-out requirements as applied to second competitive cable provider's franchises.[170] The FCC concluded: "we find that build-out requirements imposed by LFAs [Local Franchising Authority] can constitute unreasonable barriers to entry for competitive applicants" and that it was "unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates."[171]

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[167] NBP Recommendation 8.19. *See* NBP, Chap. 8, at 153.

[168] 2005 *Cable Franchising NPRM*, ¶ 20.

[169] 2005 *Cable Franchising NPRM*, ¶ 23.

[170] *2007 1st Cable Franchising Order and Further NPRM*, ¶¶ 31-42 and ¶¶ 82-91.

[171] *Id.* ¶ 40 and ¶ 89, respectively. *See also, In the Matter of implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992,* MB Docket No. 05-311, FCC 07-190, *Further Notice of*

But as demonstrated in these Comments, a city-wide build out requirement has benefitted broadband deployment in the cities that required it, as documented in the 2011 Connected Texas Report data, cited *supra*. City-wide build-out should be encouraged within a reasonable time. The Coalition recognizes that one-size does not fit all. A reasonable period of time will vary depending on a number of factors, such as population density, the size of the area to be served and system design. A city of five square miles densely populated with overhead lines can be built-out fairly quickly; whereas a larger city, less densely populated that requires underground utilities will need additional time. The time frame also depends on a reasonable amount of time for the cable provider to reasonably recoup its capital investment for a build-out. The cost of the build-out and the revenue/ business plan of the cable provider are interrelated. The FCC should encourage city-wide build-out, with local flexibility, e.g., a customer driven "crawling-out" process—as potential customers in close to a providers' existing footprint request service, the provider builds-out to them. Such a "crawl-out" requirement nation-wide would balance the public interest to accelerate broadband deployment with the provider's business interest and the local needs and conditions.[172]

V. CONCLUSION

The Coalition urges the FCC to adopt the NBP Recommendations 6.6, and to promptly establish a joint of task force with state, Tribal, and local policymakers to craft guidelines for

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Proposed Rulemaking, 22 FCC Rcd. 19633, ¶ 9 (Nov. 6, 2007) ("*2007 2nd Cable Franchising Order*") (build out restriction is not applicable to incumbents).

[172] *But* s*ee*, *2007 1st Cable Franchising Order and Further NPRM*, ¶ 37, where the FCC rejected local flexibility to require city-wide build-out of a second competitive cable provider. That rejection should be reconsidered in light of the extraordinary broadband deployment results of city–wide build-out requirements in the urban areas of Texas, as documented in the 2011 Connected Texas Report.

rates, terms, and conditions for access to public rights of way. The Coalition also urges the FCC to adopt the NBP Recommendations 8.19 to allow Tribal, state, regional, and local governments to build broadband networks and by federal law to preempt any state laws that restrict municipally-provided broadband. Finally, the FCC should expressly encourage cities to require city-wide build-out, even by new providers, in a flexible, provider specific manner.

Rights of way management oversight does not delay use of the rights of way, it enhances it by allowing all users of the rights of way to proceed with construction projects in an orderly, safe manner, in coordination with other users. To even suggest there is a need for a less coordinated use of the rights of way in an anarchist, "wild-west" fashion, simply ignores the realities of urban life and the principal purposes of streets—for use by the traveling public. The Coalition is confident that the FCC will not ignore that reality and of the principal purpose for streets.

The Coalition welcomes the opportunity to submit these comments and looks forward to further dialogue with the Commission.

Respectfully submitted,

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